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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

ALUMINUM COMPANY OF AMERICA AND ROME CABLE CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the district court approving the plan of divestiture (App. A, *infra*, pp. [illegible]-15a) and establishing the terms of divestiture (App. B, *infra*, 16a–35a) are unreported. The opinion of the district court on the merits is reported at 214 F. Supp. 501, and this Court's opinion reversing that decision is reported at 377 U.S. 271.

JURISDICTION

The judgment of the district court approving the plan of divestiture was entered on January 20, 1967, and notice of appeal was filed on March 20, 1967. By order dated May 18, 1967, the lower court extended the time for docketing the appeal in this Court to and including June 19, 1967. The jurisdiction of this

Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29; *Brown Shoe Co.* v. *United States*, 370 U.S. 294; *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316.

QUESTION PRESENTED

In *United States* v. *Aluminum Co. of America*, 377 U.S. 271, this Court held that the 1959 acquisition by Alcoa of the Rome Cable Corporation violated Section 7 of the Clayton Act, and ordered divestiture. The question presented is whether the district court's decree of divestiture and its order approving the sale of Rome to the Okonite Company constituted appropriate and adequate relief.

STATUTE INVOLVED

The relevant portions of the Clayton Act, 38 Stat. 731, as amended, provide as follows:

Section 7.

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly [15 U.S.C. 18].

Section 15.

> The several district courts of the United States are invested with jurisdiction to prevent

> and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case * * * [15 U.S.C. 25].

STATEMENT

This is a direct appeal from a final judgment of the district court approving a plan of divestiture whereby Rome Cable Corporation ("Rome"), found by this Court to have been illegally acquired by the Aluminum Company of America ("Alcoa"), would be sold to the Okonite Company ("Okonite"), which, like Rome, is a non-integrated manufacturer of wire and cable products.

THE COMPANIES INVOLVED

Rome. Rome is a producer of a wide range of wire and cable products. It is known for its substantial technical capabilities, as an aggressive and effective competitor (R. 666, 937, 1073)[1] and "had a broad line of high-quality copper wire and cable products in addition to its aluminum conductor business, a special aptitude and skill in installation, and an active and efficient research and sales organization." 377 U.S. at 281. Its annual sales for 1956 through 1965 ranged

[1] "R." refers to the printed record in the prior appeal to this Court, No. 204, 1963 Term.

between $33 million and $56 million (DXR 50).[2] Its 1966 sales were estimated during the proceedings on divestiture at $60 million, due to prevailing high prices and increased productivity (Tr. 207–09).[3] In 1960 it ranked at least eighth in sales in the wire and cable industry (DXR 56).[4]

Okonite. Okonite is an 83 percent-owned subsidiary of Ling-Temco-Vought, Inc. ("LTV").[5] LTV acquired it from the Kennecott Copper Corporation ("Kennecott") pursuant to a district court judgment of divestiture resulting from the ruling that Kennecott's prior acquisition of the then independent Okonite violated Section 7 of the Clayton Act. *United States* v. *Kennecott Copper Corp.*, 231 F. Supp. 95 (S.D.N.Y.), affirmed *per curiam*, 381 U.S. 414, subsequent opinion on relief, 249 F. Supp. 154 (S.D.N.Y.). Okonite is a non-integrated fabricator of wire and cable products. It is among the largest independent copper wire and cable producers, exercising leadership in research and engineering, enjoying a reputation for quality, and offering a broad line of wire and cable products (GX 800–804, 807; Tr. 58, 148, 347). Its ranking, assessed conservatively,

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[2] "DXR" refers to the defendants' exhibits on relief.

[3] "Tr." refers to the transcript of proceedings held on November 2–4, 1966, relating to the proposed sale of Rome to Okonite.

[4] Rome's true position as a seller of wire and cable products was probably closer to fifth, because three of the companies listed in the cited exhibit—Western Electric (first), General Motors (fifth), and General Electric (seventh)—consume substantial portions of their own production.

[5] Except where otherwise indicated, the facts regarding LTV and Okonite are taken from the district court's opinion approving Alco's plan of disposal.

was ninth among wire and cable producers in 1960 (DXR 56).* Okonite distributes its products in a national market (GX 804, 809; Tr. 339) and continually reviews its product lines with a view toward meeting consumer demands as market changes occur (GX 803, Tr. 437). Okonite's sales for the year 1965 were approximately $68.5 million (GX 800).

The district court in the *Kennecott* case, *supra*, found that "Okonite was the country's second largest independent insulated wire and cable fabricator;" that

> [t]he Okonite management was young and progressive and was reputed to be one of the most able in the industry. As an independent, Okonite relied on research, leadership in engineering and a reputation for quality to help market its products and to earn premium prices where possible. It claimed to be a leader in its field in terms of know-how and production ability. Its product line was quite broad compared with other independent wire and cable companies [231 F. Supp. at 96, 97];

and that "Okonite manufactures a broad range of insulated copper wire and cable, as well as some bare wire." 249 F. Supp. at 159.

LTV. LTV, which recently acquired Okonite, is "concededly * * * a strong, well-managed diversified business corporation. It operates through four subsidiaries in the development and production of materials in the fields of aeronautics, electronics, missiles,

* If the self-supplying wire and cable producers are excluded, see note 4, *supra*, p. 4, Okonite would rank approximately sixth.

space and through Ohonite in wire and cable products * * *. It shows steadily increasing net assets which approximate 220 million dollars as of June 30, 1966. It also shows a substantial increase in sales and profits for the first nine months of 1966 as compared with the same period of 1965" (App. A, *infra*, p. 4a). Its dramatic expansion represents "one of the high growth situations in this country" and it has "made a smash success of Ohonite in the first nine months" (Tr. 58-59).

THE DISTRICT COURT PROCEEDINGS

On April 1, 1960, the United States brought suit charging that the 1959 acquisition of Rome by Alcoa violated Section 7 of the Clayton Act. The district court dismissed the suit after trial, finding that competition had not been injured in the product markets that it determined to be the relevant lines of commerce. 214 F. Supp. 501. On appeal this Court reversed, holding that competition was substantially lessened in the aluminum conductor sub-market. 377 U.S. 271. The case was remanded to the district court "since there must be divestiture * * *." 377 U.S. at 281.

Following unsuccessful attempts by the parties to agree upon a judgment, the district court after evidentiary hearings entered a decree of divestiture on April 27, 1966. The decree, based largely upon a plan of relief proposed by Alcoa, required Alcoa to attempt for a period of six months to sell the Rome facilities; after that time the period could be extended, at the court's discretion, for another three months. If Alcoa

failed to find a purchaser within that time, it could apply to the court to authorize other relief; the judgment specifically included the alternatives that Alcoa (a) could be permitted to sell only the Rome assets employed in manufacturing the aluminum wire and cable products that overlap with Alcoa's products, or (b) could keep those assets but not use them for five years, or (c) could be relieved entirely of the obligation to sell. The price which Alcoa was permitted initially to establish as an approximate minimum for the sale, termed an "upset" price, was based on the value of Rome's land, plant and equipment as carried on Alcoa's books, plus raw materials, work in process, inventories, and the like, certain pension and termination pay plans, and incidental expenses relative to the sale. The sale was to be made to an "eligible purchaser," defined simply as "any person, firm, or corporation approved by the court" (App. B, *infra*, p. 29a).

The United States opposed the time limit and upset price provisions, arguing that they unduly restricted Alcoa's alternatives and incentives for achieving prompt and complete divestiture.

On October 17, 1966, Alcoa requested the court to approve a proposed sale of Rome to Okonite for approximately $31 million, the upset price as of August 31, 1966. The United States opposed the sale on two principal grounds: first, that the sale not only would fail to dissipate the anticompetitive effects of Alcoa's original Section 7 violation but, by merging two previously independent and substantial wire and cable fabricators, would present significant competitive problems of its own; and second, that there had been

no showing that Rome could not have been divested by less anticompetitive means, since the high "upset" price had discouraged other prospective purchasers. After an evidentiary hearing the court approved the sale on January 20, 1967. Rejecting the contention that the acquisition involved significant competitive problems, the court ruled that the existing competitive overlap between Rome and Okonite was "of de minimis proportion" (App. A, *infra*, p. 7a), and that Okonite and Rome were not "potential competitors" because "there is no evidence that in the foreseeable future either Rome or Okonite plans to or is capable of entering a product field other than it now occupies" (*id.*, p. 10a). The court indicated (*id.*, p. 11a; Tr. 36, 493) that Okonite's ability to provide funds for the operation of the Rome facilities and the salutary effect of such operation on the local economy of the Rome, New York, community were factors in its decision to approve the sale.

THE QUESTION IS SUBSTANTIAL

This appeal presents substantial issues concerning the standards by which a district court is to determine the propriety of a proposed plan of relief from an acquisition that has been found to violate Section 7 of the Clayton Act. The "remedial phase [of an antitrust case], more often than not, is crucial. For the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it" (*United States* v. *duPont & Co.*, 366 U.S. 316, 323; see, also, *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 89). This Court has stated that "complete divestiture is peculiarly appro-

priate in cases of stock acquisitions which violate § 7" (*duPont, supra,* p. 328), and in the prior appeal in this case it held that "there must be divestiture" (377 U.S. at 281). We recognize at the outset that in the present case the sale to Okonite would constitute "complete divestiture" of Rome and thus in one sense would be "effective to redress the antitrust violation proved" (*duPont, supra,* p. 323), *i.e.,* that Alcoa's acquisition of Rome was "reasonably likely to produce a substantial lessening of competition within the meaning of § 7" in the relevant market of "aluminum wire and cable" (*United States* v. *Alcoa,* 377 U.S. 271, 273, 280).

In a more meaningful sense, however, such a sale would not effectively cure the basic vice of the Alcoa-Rome merger. The fundamental anticompetitive evil of the merger was in changing the structure of the market—already "highly concentrated" and "dominated by a few companies" (377 U.S. at 278–279)—by eliminating one of the few remaining independent significant competitive forces there (*id.* 280–281). In other words, the market tended to be substantially less competitive after the merger than it had been before; the purpose of relief, therefore, is to reestablish, to the maximum extent possible, the competitive situation that would have existed at the time of the relief proceeding if the merger had not taken place. This is, at best, a difficult task. Particularly in a case such as this, where considerable time has elapsed since the merger,[7] it may be impossible to determine, with any degree of accuracy, how the acquired firm would have

[7] Alcoa acquired Rome more than eight years ago, in March 1959 (R. 1284).

fered had there been no merger. In addition, the pre-merger competitive situation may have been further distorted by the advantages the acquiring firm obtained during the time the merger has been in effect. Thus, merely to undo the merger does not necessarily restore the prior competitive situation; the dynamics of economic change may make such restoration impossible. But this is all the more reason to be wary of making the sale of the illegally acquired company the occasion for sanctioning a merger of an actual and a potential competitor which also, in effect, furthers concentration.

Moreover, relief in a Section 7 case would not be "effective to redress the antitrust violation found" (*duPont, supra*) if, in the process of attempting to restore the competitive situation that the merger precluded, it created new significant competitive problems. Since such problems would arise as a result of efforts to undo the merger, they are directly attributable to it; and it is no less important to avoid new competitive restraints than it is to eliminate the old ones. In determining the significance of such problems, the government is not required to show that the disposition proposed would violate Section 7. *United States v. duPont, supra*, at pp. 331-332. Rather it need only appear that such relief leaves a substantial likelihood that competition in the industry remains significantly less than what it would have been but for the original violation. To be sure, it may not always be possible to avoid all new anticompetitive consequences [illegible] divestiture. But that is all the more reason why that district court should be held to a strict standard in determining whether a proposed plan of divestiture does create the probability of significant

new threats to competition and, if so, whether there is alternative relief that would be equally effective in undoing the merger while at the same time minimizing new anticompetitive effects. Similarly, the court should avoid any provisions in the decree that would make such anticompetitive effects more likely.

In approving the sale of Rome to Okonite the district court applied the wrong standards for determining whether the disposition would create significant anticompetitive problems. Had the court applied the proper standards, it should not have approved the sale on this record.[8] Moreover, two provisions of the district court's original decree—the high "upset" price set as an approximate initial minimum sales price, and the relatively short period during which Alcoa was required to attempt to find a purchaser—restricted the scope of the search for alternative purchasers of Rome and thereby decreased the likelihood that appropriate relief, raising no significant additional competitive problems, would be achieved.[9]

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[8] We do not assert that a sale of Rome to Okonite would be improper under all conceivable circumstances. Our contention is rather that the district court applied an erroneous evaluation of the competitive problems presented by such sale, and that as a result of the provisions of the decree inimical to the fullest search for an appropriate purchaser, the district court could not determine whether more satisfactory alternatives were available.

[9] Although the government objected at the first hearing to relief in such provisions, it did not appeal therefrom at that time because review of the issue then would have been premature, since within the period Alcoa might have found a purchaser for Rome at the upset price which presented no significant competitive problems. The time to seek such review was when the district court approved a purchaser which the government disapproved.

We stress that our disagreement with the district court involves not merely the claim that it improperly exercised its discretion in approving the sale, but the broader point that it applied erroneous standards for deciding the adequacy of relief. This appeal, therefore, presents legal issues of continuing and substantial importance in the administration of Section 7 of the Clayton Act, which warrant plenary consideration by this Court.

1. In evaluating the propriety of the proposed disposition of Rome to Okonite, the district court failed to recognize, as an overriding consideration, that where two unlawful mergers have taken place in the same industry and where the courts in condemning the mergers have emphasized the competitive importance of independent companies (377 U.S. at 280–81; 231 F. Supp. at 105), the merger of the two acquired companies is not likely to be the best method for restoring the industry's competitive structure as it would have existed but for the illegal mergers.[19] Even more significantly, however, the court failed to recognize the importance of avoiding divestiture to a firm which would create additional competitive prob-

[19] The disposition of Rome to Okonite actually involves the combination of three once-separate companies, since the Okonite properties that Kennecott transferred to LTV included Kennecott's own, internally-developed wire and cable facilities. See 249 F. Supp. at 156; Oler Deposition, p. 148. As to the desirability of maintaining independent fabricators in an industry characterized by a high degree of vertical integration, see Adams & Dirlam, *Steel Imports and Vertical Oligopoly Power*, 54 Amer. Ec. Review 626, (1964). The authors there find the existence of independent steel fabricators to be a significant check on the pricing power of the integrated steel companies.

lems, and it applied erroneous standards for determining the existence of such problems. Had the court applied the proper criteria for ascertaining the existence of actual and potential competition between Rome and Okonite, it should not have approved the sale on this record.

a. The record shows that there is significant potential competition between Rome and Okonite in the aluminum conductor line of commerce. This Court, in reversing the district court's dismissal of the government's suit, found that aluminum conductor was an appropriate sub-market and that in that line of commerce, the merger of Alcoa and Rome substantially lessened competition. In the relief proceedings, however, the district court concluded that "since Okonite does not manufacture aluminum products of any kind, it would seem to necessarily follow that the anti-competitive effects fatal to the Rome-Alcoa merger will be entirely eliminated under the proposed plan" (App. A, *infra*, p. 6a). Relying on its evaluation of the stated intentions of company management with respect to future production, the court ruled that it

> has no basis to assume that the present policy of the governing body of either involved corporation will in the foreseeable future reverse its present policy of management so as to increase its product lines and thereby become actual competitors in the market place. The judgment of experienced businessmen is more reliable than speculation * * *. [App. A, *infra*, p. 10a]

The court further stated that Okonite's "prior unsuccessful efforts in the aluminum field may well have dampened its ardor" (App. A, *infra*, p. 9a), and that in the future only Kerite, and not Okonite, would be likely to produce aluminum conductor.

In so holding, the court failed to follow the standards announced by this Court for assessing, in the even stricter context of a Section 7 suit, the probability that a firm will enter a market in the future. The touchstone for assessing the likelihood of entry is not the intentions stated by company management during the course of litigation; it is rather the objective market factors that bear upon a firm's decision to enter a new line of endeavor. *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158; see *Federal Trade Commission* v. *Procter & Gamble Co.*, No. 342, O.T. 1966, decided April 11, 1967.

The record in this case shows that Okonite had the capability to produce aluminum wire and cable and that there were strong market pressures impelling it to do so. Okonite's Vice-President for Manufacturing stated without challenge that the "same machinery can be used to draw aluminum and copper. Some modifications have to be made in the lubricating system to do it but essentially the machines are similar" (Wagman Deposition, p. 72). It "is not a difficult problem" (*id.* at 73-75). He further stated that Okonite's insulating capability could be applied to a wide variety of products (*id.* at 30-36, 48, 66). As to Okonite's incentive to produce aluminum wire and cable, Okonite's Vice-President for Marketing testified that "because of the scarcity of copper * * * [the substi-

tution of aluminum is] the most significant trend today in the industry" (Oler Deposition, p. 182). Moreover, even as a matter of subjective corporate intention, the record shows that Okonite was interested in producing aluminum conductor. At the hearing on relief Okonite's President testified that "it is most likely that we will be forced to convert to aluminum conductor" in manufacturing certain underground wiring (Tr. 305). An internal LTV document indicates that LTV's interest in aluminum was so substantial as to have been a significant factor in its initial decision to purchase Rome: "LTV's need to develop aluminum conductor applications in light of the copper supply problem can most efficiently be accomplished through Co. 'B' [Rome] rather than reinstituting aluminum capability at Okonite" (GX 801(B)).

Thus, Okonite had substantial reasons for producing aluminum conductor, the manufacturing capability for doing so, and a stated interest in the undertaking. The sale of Rome to Okonite eliminated the possibility that Okonite would have re-entered that market through internal growth, thereby creating an additional competitor in this highly concentrated field. The sale of Rome to Okonite, which thus substituted the merger of an actual and a potential competitor for the merger of two actual competitors, therefore was not an adequate attempt to restore competitive conditions as they would have existed but for the illegal merger of Alcoa and Rome.

b. The district court also failed to recognize the significant actual and potential competition between Rome and Okonite in other segments of the wire and

cable industry." At the hearing on divestiture, the government showed that Rome and Okonite were substantial producers of wire and cable, ranking eighth and ninth in this field; that both produced relatively broad lines of products; that both were known for their technological abilities; and that both in the past had expanded their lines to include new products. The Census figures for "nonferrous wire drawing" indicated that in the broad field of insulated wire and cable the combined Rome-Okonite share of sales (which totaled $2 billion for the industry) was 4.1 percent in 1964. In the subcategory of power wire and cable Rome had 2.5 percent; combined with Okonite's 12.6 percent, this amounted to 15.1 percent of total shipments. In portable power cable under 601 volts the combination of Rome's 3.9 percent with Okonite's 7.8 percent resulted in a total of 11.7 percent in 1963. In thermoplastic power cable over 601 volts, Rome had 6.9 percent and Okonite 3.3 percent for a combined share of 10.2 percent (GX 800).

Despite this significant overlap, the district court found that the statistical data reflected only "conceded facts which are of de minimis proportion"

[11] While the finding of violation of Section 7 in this case involved only the aluminum sub-market of the wire and cable industry, the other segments of the industry are closely related to that market. The evidence which we have cited in part (a), *supra*, demonstrates that for some applications copper and aluminum may be competitive, and hence that the competitive structure of one market may affect the behavior of companies in the other. In addition, the *Kennecott* case, *supra*, did involve the lessening of competition in other segments of the wire and cable industry, and the proposed combination of Rome and Okonite would therefore weaken the relief obtained in that case.

(App. A, *infra*, p. 7a). In doing so, it accepted the market analysis offered by Alcoa which fragmented the various product markets into even smaller lines of commerce in which the overlap would be less substantial." The record demonstrates, however, that the Census data are, if anything, too specific rather than too broad. Okonite officials admitted that Okonite considers Rome to be a competitor (Viggiano Deposition, p. 25); that "anyone who manufactures wire cable is a competitor, whether they are [*i.e.*, whether we consider them to be] in any of our product lines or not" (Oler Deposition, p. 174; see Viggiano Deposition, p. 27); and that there is competitive overlap between some of the different Census categories (Oler Deposition, pp. 200–04). Indeed, Alcoa documents introduced

[12] It is significant that the documents considered internally by LTV in deciding to acquire Rome used statistical data prepared by the National Electrical Manufacturers Association ("NEMA") rather than Census data; the NEMA figures reflect broader markets that more closely approximate the actual competitive overlap between the products involved, and were recognized by LTV to be in this sense "the most inclusive available" (GX 801(B); see Tr. 390–393). For example, the NEMA figures show that in the broader competitive category of rubber and plastic power and control cable, Okonite had 11.9 percent and Rome 6.2 percent for a combined total of 18.1 percent of total sales by NEMA members in 1965 of $227 million. In portable molded cords and cables, Okonite had 15.9 percent and Rome 3.3 percent for a combined total of 19.2 percent; NEMA sales in this category were $22.6 million (GX 801(B)). That the Census figures understate the extent of actual competitive conditions is further demonstrated by LTV's internal memorandum stating that in its view, "high voltage paper [insulated cable, an area in which Okonite is probably the overall leader and in which Rome does not participate] is also fundamentally competitive with high voltage rubber and plastic," the latter of which Rome produces in substantial amounts (*ibid.*).

in the trial on the merits indicated that when Alcoa was considering purchasing a company in the insulated wire and cable business it first attempted unsuccessfully to purchase Rome, and then contemplated acquiring Okonite; it abandoned the latter idea only when Okonite was acquired by Kennecott (GX 167-169, R. 2192-2195).

In addition to the significant actual competitive overlap, the record demonstrates that under the appropriate standards enunciated by this Court, Rome and Okonite are significant potential competitors. An Okonite official stated that "we generally classify anyone making wire and cable a competitor of Okonite. If not now, certainly a potential competitor" (Viggiano Deposition, p. 27). The same official recognized that, with some specialized exceptions, the facilities for producing various types of wire and cable are interchangeable (*id.* at 65, 66), and that the process of deciding which type actually to produce is basically an "elect[ion] based upon the corporate strategy and the type of markets that we are servicing * * *" (*id.* at 36).

The district court, however, rejected this evidence of potential entry because it relied, as it had done in evaluating Okonite's potential entry into aluminum wire and cable, on disclaimers of managerial intent. The court stated that "the business policy of a corporation rests primarily upon its officers and directors who are held accountable in the matter of their business judgments," and, as we have noted, *supra*, that "there is no evidence that in the foreseeable future either Rome or Okonite plans to or is capable of

entering a product field other than it now occupies" (App. A, *infra*, p. 10a). This was an improper standard for assessing potential competition;[18] this Court has recognized that even in the more exacting context of finding a Section 7 violation, the critical factor is an objective market analysis, not management's stated intentions and predictions. *United States* v. *Penn-Olin Chemical Co., supra;* see *Federal Trade Commission* v. *Procter & Gamble Co., supra.* The district court's standard was particularly inappropriate in the wire and cable industry and for the particular companies involved. As early as 1957 the president of the then independent Rome stated that "39 percent of the products which we sold this year we were not making at the end of World War II" (R. 1753); and Alcoa's own witness at the hearing on the proposed sale of Rome to Okonite characterized LTV as a "high growth" company that "had made a smash success of Okonite in the first nine months" (Tr. 58–59).

Thus, there is not only significant potential competition between Rome and Okonite in aluminum wire and cable, but significant actual and potential competition in copper wire and cable as well. In approving the sale the district court thus sanctioned a merger with significant additional anticompetitive consequences of its own.

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[18] We refer to the court's reliance on the firm's "plans." As to production capabilities, we have shown that the industry is characterized by considerable flexibility in production facilities, and that both Rome and Okonite have the capacity to enter into additional areas of the wire and cable business.

2. The district court further erred in failing to recognize the need to consider whether there were any alternative methods of divestiture that, although equally effective to undo the merger, would avoid the anticompetitive consequences which the Rome-Okonite transaction entails. The original decree of divestiture provided for sale to an "eligible purchaser," which was defined as someone whom the court would approve (App. B, *infra*, p. 29a). During oral argument on the proposed sale, the court stated that it was not appropriate to speak of degrees of eligibility (Tr. 493). In other words, it was the court's view that in determining whether the competitive problems which might result from a particular sale warrant its rejection, it is immaterial whether a sale to some other purchaser would pose lesser or no such problems.

The considerations governing the formulation of relief in Section 7 cases (see *supra*, pp. 8-11), however, preclude such a narrow approach. For the aim of divestiture is to restore, as effectively as possible, the competitive situation in the industry as it would have been had the merger not taken place. To whatever extent there may be an alternative method of divestiture which reduces or eliminates additional competitive problems, its utilization would further that objective.[14] The court's failure to make such an inquiry was particularly serious here since, as we now show, two provisions in the decree of divestiture

[14] Compare the jurisdictional statement in *United States* v. *Third National Bank in Nashville*, No. 86, this Term, p. 23, probable jurisdiction noted June 12, 1967.

operated significantly to deter other prospective purchasers from acquiring Rome.

3. The district court's errors in approving the sale were compounded by two provisions in the judgment of divestiture—pursuant to which Alcoa negotiated the sale—which reduced the likelihood of obtaining the most appropriate relief by discouraging potential purchasers of Rome.

a. The judgment established an unreasonably high price for the Rome assets. The district court ordered Alcoa to negotiate for the sale of Rome at what it termed an "upset" price. Although the upset price provision did not in terms guaranty that Alcoa would suffer no loss upon divestiture, in operation this was its practical effect.[18]

We submit that providing such a price floor reflects an undue concern for the private interests of the company that made an illegal acquisition, and seriously restricts the alternatives available for divestiture either by spin-off or by sale to a non-competing firm. In the present case only three companies in addition to LTV expressed more than casual interest in acquiring Rome at the upset price; there is every reason to believe that others would have been willing to negotiate at a lower price.

The testimony of Alcoa's executive vice president whose duty was to sell Rome established that poten-

[18] An Alcoa official testified that Alcoa had purchased Rome for approximately thirty million dollars—or thirteen million dollars more than the book value at that time. The upset price reflected the entire "good will" or "going concern" value that Alcoa had paid, less depreciation (Tr. 156, 161).

tial purchasers were deterred by the high price. When asked if alternative purchasers were available, he conceded that "I could get talks going with lots of people I am sure, but there are an amazing number of people that want to pick up something for nothing. The first thing we would get would be thousands of hungry brokers getting into the act * * *" (Tr. 81). He indicated that Alcoa considered a price to be reasonable only if it covered the amount Alcoa had paid, less depreciation (Tr. 51–52, 80, 151). He admitted that Alcoa had not hired (Tr. 132) or even approached (Tr. 131) any broker. Similarly, Alcoa's explanation of why it had rejected other offers basically was that the price had not been sufficient. Although Alcoa argued that it could not have "marketed" the securities that it would have been required to accept as payment under those offers—and although the government might well have objected to Alcoa's retention of such security interests—the record shows that Alcoa's real concern was that it could not have sold the securities for a cash realization equivalent to the upset price (Tr. 62–69, 73–75).

The district court stressed in its first opinion on remand, establishing the terms of relief, that the purported similarity between the present case and *United States* v. *Kaiser Aluminum & Chemical Corp.*, Civil Action No. 2[illegible], D. R.I., April 28, 1961—a non-litigated Section 7 case settled by consent decree—"prompted this court to adopt the Kaiser judgment in all but one of its essential parts" (App. B, *infra*,

p. 26a).[16] But in *Kaiser* there was no judicial adjudication that the acquisition violated Section 7; and a consent judgment entered in such circumstances throws little, if any, light upon the scope of proper relief in a fully litigated case. *United States* v. *du Pont, supra,* p. 330, n. 12.

The court also stated that the upset price was designed to eliminate speculators from seeking to purchase Rome (App. B, *infra,* p. 24a). Protection against speculators, however, hardly required tying the divestiture price to the price which the acquiring company paid.[17] If the court believed that only a company with substantial financial and management resources (such as LTV) could have operated Rome as a going concern, with the attendant benefits to the Rome, New York, community that the district court envisioned, lowering the divestiture price might well have attracted one or more of such additional firms.

In sum, the upset price, although aiding Alcoa to come out whole from its illegal acquisition of Rome, diminished the availability of purchasers for Rome and thus made it less likely that a sale without the

[16] The difference to which the court alluded was that the *Kaiser* decree provided that if Kaiser could not find a purchaser (at an upset price) after nine months of bona fide effort, it would automatically be allowed to keep the facilities it had acquired; the court in the present case left that contingency for further determination (see part 8b, *infra*).

[17] Such protection could more easily—and certainly more directly—have been afforded by a provision requiring any purchaser of Alcoa to assure the court that it intended to operate the Rome facilities as a going concern; such provisions are common in antitrust judgments.

anticompetitive effects of the Okonite merger could be made. "[C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests" (*United States* v. *duPont & Co., supra,* at 326).

b. The judgment established a period of only six months in which Alcoa was to attempt to find a purchaser willing to pay the upset price. After that time, the court could require Alcoa to continue for another three months to try to sell Rome; but beyond that period the judgment held out the possibility of considerably lesser relief. Thus, it explicitly indicated that if Alcoa was unable to find such a purchaser within that time, Alcoa might be permitted to sell only part of the assets, or to leave part of the assets idle for five years, or, indeed, to keep and use all of the Rome assets without making further efforts at divestiture (App. B, *infra,* p. 31a-32a). In thus holding out to Alcoa the hope that it could keep Rome or at least avoid complete divestiture, the district court failed to perform properly its duty to fashion a judgment affording conditions—including incentives for prompt divestiture—that maximized the likelihood that full divestiture would occur under circumstances most likely to avoid additional anticompetitive problems.

CONCLUSION

This appeal presents substantial issues affecting the adequacy of relief in antitrust litigation under Section 7 of the Clayton Act. Probable jurisdiction should be noted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
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JUNE 1967.

APPENDIX A

United States District Court, Northern District of New York

Civil No. 8030

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALUMINUM COMPANY OF AMERICA AND ROME CABLE CORPORATION, DEFENDANTS

Petition To Approve Plan of Divestiture

Hearing held Nov. 2, 3, 4, 1966; Submitted Dec. 5, 1966; Decided Dec. 21, 1966.

MEMORANDUM DECISION AND ORDER

BRENNAN, *Judge:* Pursuant to the terms of the final judgment herein, the defendants under date of October 17, 1966, have filed a petition requesting this court's approval of a proposed plan of divestiture of the properties of the Rome Cable Corporation now held by Aluminum Company of America. The plaintiff opposes the approval of such plan.

This proceeding arises out of a contested antitrust litigation, the background of which is found in *United States* v. *Aluminum Company of America and Rome Cable Corporation*, 214 F. Supp. 501, reversed in 377 U.S. 271; and in this court's decision (unreported) dated April 27, 1966 which fixed the terms of the final judgment. Familiarity with these decisions will be assumed. As in previous decisions, the defendants will be referred to as "Alcoa" and "Rome" respectively.

In accordance with the direction of the United States Supreme Court, and the provisions of the subsequently entered final judgment, Alcoa was directed to sell all of the assets of Rome acquired by Alcoa in 1959. Such sale is to include the manufacturing facilities of Rome, New York, Torrance, California and Collegeville, Pennsylvania, together with all subsequent capital improvements, machinery, inventory and work in process. As indicated above, defendants now present a proposed plan whereby such assets will be sold to The Okonite Company, hereinafter referred to as "Okonite". The purchase price of such assets will apparently involve a payment of between thirty and thirty-five million dollars, same to be paid in cash in three installments, the first payment of one-third of the purchase price to be made on the date of the closing of the transaction and the balance in equal installments three and six months thereafter. Alcoa retains or obtains no creditor or lien interest in such assets. In other words, the plan contemplates the complete divestiture ordered. Other details of the proposed plan would seem to be unnecessary to this decision.

Under date of October 27, 1966, the plaintiff filed with this court a memo in opposition to the defendants' petition, referred to above. The quotation below, taken from the above memo, sets out the bases of the plaintiff's opposition. "Plaintiff objects to Alcoa's proposal on two grounds: (1) it will not adequately dissipate the anti-competitive effects of its acquisition of Rome; and (2) the combination of Rome and Okonite would raise additional significant competitive problems". The issues, thus created, came on for a hearing before this court on November 2-4, 1966. Oral evidence was offered by defendants and documentary evidence on behalf of the defendants was received.

The plaintiff relied upon documentary evidence alone. Briefs have been submitted and the problem is before the court for decision. Since the decision necessarily involves the consideration of the status of the three interested corporations in the business world, a summary statement relative to same would seem appropriate at this point.

Okonite is a eighty-three percent-owned subsidiary of Ling-Temco-Vought, Inc., hereinafter referred to as "LTV", and was organized to acquire the business and properties of a corporation of the same name in accordance with the decisions in *United States* v. *Kennecott Copper Corp.*, 231 F. Supp. 95 and 249 F. Supp. 154. It is a non-integrated fabricator of wire and cable products with plants located in Passaic, Paterson and North Brunswick, New Jersey and Philipsdale, Rhode Island. Its wire and cable business is concentrated in heavy duty, high voltage products. Its principal lines consist of high voltage paper insulated cable, communications cable, control cable, signal cable, power cable and bare copper. Like most companies engaged in a similar business, Okonite suffered substantial financial losses from 1958 to 1963. After its acquisition by LTV, Okonite's volume of sales and income have substantially increased. Okonite is not an actual competitor in aluminum conductor lines of commerce. Since the early part of 1965, it has made no such products and is not recognized in the market as the supplier of same. Its experience for three years in the aluminum conductor products field was apparently unsuccessful from either a market share or financial return basis, it being evident that it lacked the technology necessary in that field. In a word, it specializes in high voltage copper cables and its plants are oriented to principally produce such products.

Concededly LTV is a strong, well-managed diversified business corporation. It operates through four subsidiaries in the development and production of materials in the fields of aeronautics, electronics, missiles, space and through Okonite in wire and cable products. It thus seeks protection through product diversification from serious financial loss resulting from the cycles of business expansion and recession. It shows steadily increasing net assets which approximate 220 million dollars as of June 30, 1966. It also shows a substantial increase in sales and profits for the first nine months of 1966 as compared with the same period of 1965. It has continued to successfully operate its several business enterprises as indicated in Judge Ryan's decision in United States v. Kennecott Copper Corp., supra, the repetition of which is unnecessary here. We borrow from the above decision by paraphrasing Judge Ryan's statement to the effect that we find that LTV has the financial and top-level management capabilities necessary to permit its subsidiary Okonite to purchase Rome for cash and thus sever all financial and management ties with Alcoa. Its success in the operation of Okonite justifies the decision to permit its purchase of that corporation and contributes to the attractiveness of the submitted plan. This court is satisfied that the intention of both LTV and Okonite in the purchase of Rome is to maintain and expand its position as a competitor in the market available to its products. It seems plain that the purpose of the purchase of Rome is to obtain a full line of aluminum and copper wire and cable products which will complement those already manufactured and sold by Okonite. Again it seems plain that the purpose of the purchaser here is to complement its product line rather than to assimilate a competitor.

Rome's position in the market both at the time of its acquisition by Alcoa and subsequent thereto has been specifically found in the prior decisions referred to above and a detailed repetition thereof would serve no useful purpose. It would appear to be sufficient to state that Rome is substantially the producer of the wire and cable products limited to what is termed in the trade as low voltage. It is non-integrated as to both copper and aluminum products and like many corporations engaged in similar activities, it conducted its business at a substantial financial loss for the years 1960, 1961, 1962 and 1963. It presently shows a profit in its operations which is apparently due to the unusual favorable market conditions, especially in the matter of copper products.

Rome's operations, which show a profit for the years 1964, 1965 and 1966, indicate that this is a favorable time for a sale of its assets. If any mistake has been made in the past, it seems to the writer that it rests upon the doubtful assumption that Rome would have had, or could obtain, the required working capital to survive the over 12 million dollar loss incurred in operations during the 1960 to 1963 period and additionally to provide the apparently necessary improvements to its machinery and facilities which required an outlay of approximately 5 million dollars. While the dark period of the above picture occurred subsequent to the acquisition of Rome by Alcoa, no fault is attributed to its management. In fact, the Government pays a high compliment to Alcoa's stewardship of Rome's operations which is referred to at some length in this court's decision dated April 27, 1966 and referred to above.

We do not need to go beyond the decision of *United States v. DuPont Co.*, 366 U.S. 316 to find the guide lines which this court must use in determining the

legal and factual effectiveness of the proposed plan to accomplish the divestiture directed. In sum, they seem to indicate that this court is vested with a degree of discretion to be exercised in the light of the object to be obtained. As in the above decision, the violation here was "not actual monopoly but only a tendency towards a monopoly. The required relief therefore is a remedy which reasonably assures the elimination of that tendency". "Divestiture is itself an equitable remedy designed to protect the public interest". The public importance of the proper disposition of antitrust cases "in their remedial phase, more often than not, is crucial". The ultimate measure must eliminate the effects of the violation found without being punitive in its nature or limited by economic hardship. At the same time, the competition afforded by Rome should be preserved both because of its importance in the communities in which it operates and the effect it exerts in the business world.

The Government's first objection to the plan, to wit—that the proposed sale would not adequately dissipate the anti-competitive effects of Alcoa's acquisition of Rome, is rather difficult to follow. As this court understands the decision of the United States Supreme Court, it found contrary to this court's decision that aluminum conductor was a line of commerce in which the legality of Alcoa's acquisition of Rome could be measured. A finding of illegality followed since both Rome and Alcoa possessed market shares therein which were held to be substantial enough so as to tend to reduce competition in violation of the statute. Since Okonite does not manufacture aluminum products of any kind, it would seem to necessarily follow that the anti-competitive effects fatal to the Rome-Alcoa merger will be entirely eliminated under the proposed plan.

The second objection is to the effect that the combination of Rome and Okonite would raise additional significant competitive problems. This contention seems to be based upon two arguments. The first is to the effect that there is an overlap in the copper products manufactured by Rome and with those manufactured by Okonite. The second is to the effect that both Rome and Okonite are potential competitors in the market for their manufactured products in that they are capable of internal expansion so as to manufacture and market products which are now solely manufactured by either of the two companies.

The first of these arguments, as to the overlap products, impresses this court as involving conceded facts which are of de minimis proportion. Without doubt, it is true that both companies are engaged generally in the wire and cable business. As previously stated, Okonite's operations are solely confined to high voltage copper cable and conductor products with special emphasis upon the paper and rubber insulated conductor items. Its products seem to be most generally adapted to special uses and may be referred to as of the underground type. Rome, in contrast to the purchaser, is essentially a low voltage product manufacturer using primarily thermo-plastic and thermo-setting insulations. It specializes in the building wire type of product which is not manufactured by Okonite.

The overlap of products appears to be found in the Power Wire and Cable census category which is divided by voltage capacities into two classes—to wit—those under 601 volts and those over the above voltage. In 1964, the last year in which the census tables for the above products are available, it appears that there is an overlap of products in four of the ten five-digit product classifications. In three of four such

classifications, the combined shares of Rome and Okonite therein are listed as less than 5% of the total shipments in those categories. Overall Okonite's three largest products account for about eighty-three percent of its total power cable shipments, none of which is manufactured by Rome.

In the matter of the sub-classification known as Portable Wire and Cable, Rome's percentage of the total shipments was 2.5% while Okonite's was 12.6%, resulting in a total of 15.1%. Passing over the other three overlapping categories as insignificant in amount, it must be admitted that the last mentioned sub-classification cannot, on its face, be so termed. The explanation thereof however indicates that the overlap is more theoretical than real. The above statement is supported in the evidence, explained in Government exhibit 800, where it appears that both molded and non-molded portable cable are included in the above sub-classification. Okonite manufactures principally molded portable power cable with its sales in 1965 representing 96% of its total sales of portable cable. On the other hand, Rome's product is principally non-molded portable cable and represents 64% of its sales of portable power cable products. The process of manufacturing the two products is different and their end usages differ with respect to a large part of the products referred to manufactured by each company, molded portable cable being used in heavy industry while non-portable cable is used in light industry and may be sold through retail outlets. All of the above leads to the conclusion that the overlap products manufactured by Rome and Okonite are insignificant competitive factors as between the two organizations. In other words, they are not considered in the trade as among themselves as significant direct competitors.

There remains to be considered the contention advanced by the Government that Okonite and Rome, if not actual, are potential competitors. Without doubt, this argument involves a measure of speculation. Common experience is full of examples of business failures due to overexpansion in competitive business especially involving managerial ability and technical skill. It is easy to say that both Rome and Okonite possess the potential to expand internally so as to become an actual competitor with the other. It is a fact, however, that Rome has been in existence since 1936 and Okonite since 1878 and neither has, over the above periods of time, developed the full product line which the Government contends is potentially readily available to both.

The Supreme Court in *United States* v. *Penn-Olin Co.*, 378 U.S. 158 at 174 states that potential competition cannot be put to a subjective test. Its definition is not susceptible of a ready and precise answer. A potential competitor apparently contempletes "an aggressive, well-equipped and well-financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market * * *". No argument can be made that Rome is or was such a competitor for several years last past. Okonite, in its present position, meets some of the requirements of the definition. However the argument that it is "waiting anxiously" to enter the above market is directly contrary to the evidence produced. Its prior unsuccessful effort in the aluminum field may well have dampened its ardor. Certainly its interest in that field has not been "long sustained" and its experience therein is some proof that it lacked "the know-how and the capacity to enter that market" * * * "at a reasonable profit". The "array of probability" found in Penn-Olin is entirely missing here.

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The business policy of a corporation rests primarily upon its officers and directors who are held accountable in the matter of their business judgments. It is true that the governing body of aggressive corporations is constantly reviewing its product lines, the quality thereof and the avenues of expansion. It is likewise correct that Okonite contemplates a business expansion but it should be emphasized that same is limited to a product or the products which are already being manufactured by that company. Here there is no evidence that in the foreseeable future either Rome or Okonite plans to or is capable of entering a product field other than it now occupies. It seems that "corporate growth by internal expansion is socially preferable to growth by acquisition". *United States v. Philadelphia Nat. Bank*, 374 U.S. 321 at 370. This court however has no basis to assume that the present policy of the governing body of either involved corporation will in the foreseeable future reverse its present policy of management so as to increase its product lines and thereby become actual competitors in the market place. The judgment of experienced businessmen is more reliable than speculation, hedged as it must be by a tight money market which seems to restrict venture capital investment. This is indicated by the lack of individual or syndicate interest in the purchase of Rome assets.

Although not a specific objection to the present petition, the Government urges that same should be rejected and further effort to dispose of Rome to a more acceptable purchaser be directed. There is no specific fault found with the means taken by Alcoa to accomplish the sale of Rome's assets. If, in fact, Oko-

nite be an eligible purchaser, further effort would seem not only to be unnecessary but detrimental to Rome's viability. The offer made constitutes a clear, clean and complete divestiture by Alcoa of Rome's assets. It obviates many, if not most, of the objections which are generally advanced in similar proceedings. It eliminates the unrest among Rome's personnel and assures them of a strong aggressive employer who has given assurance as to the continuance of Rome's presently located three manufacturing plants. It should tend to stop Rome's loss of technical help to other employers and restore a sense of security which, understandably, has been missing since the order of divestiture. The benefit to be obtained by the closing of this litigation at this time would seem to far outweigh any speculative advantage which would result from further delay.

It should be noted that the plaintiff appears to avoid advancing any contention that the proposed plan is in violation of the antitrust laws. The plan has been under consideration by the plaintiff since about August 15, 1966. It would therefore seem that no claim of such violation will be made since plaintiff, by reason of past litigation involving both Rome and Okonite, must be well acquainted not only with the wire and cable industry as a whole but with the output of the facilities and the market status of the two corporations.

In the main litigation here, the plaintiff appeared to urge that the acquisition of Rome by Alcoa resulted in an undue concentration of power in one of the giants of the aluminum industry. As this court sees it, the proposed plan would result in a company

with a full product line actually and potentially supplying the competition to the integrated copper and aluminum producers and larger independents while not significantly reducing competition among the two hundred so-called small non-integrated fabricators. The relative position of Rome-Okonite in size among the so-called independents would not thereby be changed, but the much larger producers would be afforded a more active competition in the market.

The above discussion and the findings expressed therein lead to the conclusion that the proposed plan is simply "a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market". *Brown Shoe Co.* v. *United States*, 370 U.S. 294 at 319. As such a merger, same is not impeded either by the statute or judicial interpretation. Economies in operation and an increase in competition, rather than a diminution thereof all in the public interest, invoke both the judgment and discretion vested in this court to approve the submitted plan in accordance with the prayer of the petition.

The above will constitute this court's findings and conclusions and if either litigant desires additional specific findings or conclusions, same may be submitted within ten days.

An order, providing for the approval of the proposed sale of Rome's assets to Okonite in accordance with the above decision will be prepared by Alcoa accordingly and, if not agreed upon, may be settled before this court upon three days notice, and it is

Ordered accordingly.

STEPHEN W. BRENNAN,
Senior U.S. District Judge.

United States District Court for the Northern District of New York

Civil Action No. 8030

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALUMINUM COMPANY OF AMERICA AND ROME CABLE CORPORATION, DEFENDANTS

ORDER APPROVING PLAN OF DISPOSAL

The Final Judgment in this case having been entered on April 27, 1966; the said Final Judgment having ordered and directed the defendant Aluminum Company of America (Alcoa) to sell all of the Plants of the defendant Rome Cable Corporation (Rome), as defined in Paragraph I(E) of the Final Judgment, to an Eligible Purchaser under specified conditions to be operated by said Eligible Purchaser as an operating business in competition with other firms engaged in the manufacture, production and sale of electrical conductor wire and cable products, conduit and cable installation devices; the defendants, by their Petition for Approval of Proposed Plan of Disposal filed October 17, 1966, having proposed to comply with the said Final Judgment by selling the Rome Plants, in their entirety, to The Okonite Company (Okonite), an 83 percent-owned subsidiary of Ling-Temco-Vought, Inc. (LTV); the plaintiff, by its Memorandum in Opposition, dated October 27, 1966, having objected to the defendants' Proposed Plan of Disposal; a hearing having been held at which oral and documentary evidence was presented and representations as to manner of intended use of the Plants having been made to the Court by officers of LTV; and the Court, upon consideration of the

evidence presented at said hearing and briefs submitted by the parties, having concluded in a Memorandum Decision and Order entered December 21, 1966, that the proposed sale of Rome Plants to Okonite constitutes a complete divestiture of Rome in accordance with the prior Supreme Court decision in this case and with the Final Judgment herein, and should be approved; now, therefore, it is hereby

Ordered, Adjudged and Decreed That:

1. Consummation of the Sale of the assets of Rome to Okonite in accordance with the terms and conditions stated in Defendants' Petition for Approval of Proposed Plan of Disposal, the letter agreement annexed thereto, and the Final Judgment and Memorandum Decision and Order herein dated December 21, 1966, will constitute a complete divestiture of the Rome Plants to an Eligible Purchaser;

2. The Court hereby approves the Proposed Plan of Disposal, and the transactions contemplated thereby, and authorizes defendants to enter into the necessary Agreement of Sale for consummation as soon as practicable;

3. Within five (5) days after execution of the Agreement of Sale, defendants shall submit a true copy thereof to this Court, with a copy to the plaintiff, and unless the Court or the plaintiff has noted objections thereto within ten (10) days after the filing and service of said Agreement, said defendants are authorized to close the sale in accordance with the terms of said Agreement and this Order. If objections to the Agreement of Sale are noted by plaintiff, and not thereafter resolved by the parties, the differences shall be settled by the Court on defendants' motion, with five (5) days' notice to the plaintiff;

4. Alcoa is directed to report to this Court within five (5) days after the sale contemplated by the Agreement of Sale referred to in Paragraph 3 hereof is closed.

(S) Stephen W. Brennan
STEPHEN W. BRENNAN,
Senior United States District Judge

Dated: Utica, New York, January 20, 1967.

Approved as to form.
DONALD F. MELCHIOR,
Attorney for Plaintiff.

APPENDIX B

United States District Court Northern District of New York

Civil No. 8030

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALUMINUM COMPANY OF AMERICA AND ROME CABLE CORPORATION, DEFENDANTS

Hearing held Oct. 4–7, 1965; Submitted Mar. 7, 1966; Decided Apr. 27, 1966.

MEMORANDUM DECISION AND ORDER

Re: Judgment

BRENNAN, *Judge*: This memo is intended to indicate the bases of the court's entry of a final judgment in this action and to afford a brief explanation thereof. The defendants will be referred to as "Alcoa" and "Rome" as in the pertinent prior decisions.

This is an antitrust litigation, the background of which is found in *United States* v. *Aluminum Company of America and Rome Cable Corporation*, 214 F. Supp. 501 and in 377 U.S. 271. The latter decision of the Supreme Court reversed the prior mentioned decision of this court and provided that "since there must be divestiture, the case is remanded to the District Court for proceedings in conformity with this opinion".

The lapse of time is principally accounted for by the good faith efforts of counsel for the litigants to agree upon a form of judgment which would meet the practicalities of the existing circumstances and at the same time carry out the mandate of the Supreme Court. It is sufficient to say that the efforts of counsel and the court were not successful in their purpose. A hearing was then held on October 4, 1965 at which both oral and documentary evidence was offered by the defendants. The plaintiff offered documentary evidence. Counsel next presented numerous proposed Findings of Fact. Briefs were filed by both parties and proposed final judgments were submitted. On February 4, 1966, at the request of the court, counsel appeared before the court at which time the court indicated its then conclusion as to the form and content of the proposed final judgment to be entered. As the result of this conference, the positions of the litigants were somewhat modified. Counsel were urged to agree upon the form and content of a judgment which would reflect the substance of the provisions which the court indicated were justified by the evidence. Efforts to accomplish the above result are apparently at a stalemate and the court has proceeded to prepare and enter a final judgment which it feels adequately protects the interests of the litigants, complies with the mandate of the Supreme Court and serves to protect the public and local interest insofar as same can be evaluated at this time.

Generally speaking, the difficulty here seems to arise by plaintiff's general contention to the effect that the language of the Supreme Court decision requires the complete divestiture of Alcoa's interest in the assets of Rome and the restoration of that company as a financially strong, well managed, viable corporation, capable of continued existence in the competitive area of the business world.

Alcoa, on the other hand, contends that the mandate of the Supreme Court is something less than absolute and that the language of the decision must be read in the light of the limited nature of the violation found. It further contends that the relief to which the plaintiff is entitled must be based upon equitable considerations, keeping in mind the factual circumstances affecting the public, the community interests and the obvious requirement that this court should not, by its decision, deny to the defendant Alcoa the business advantages granted to a competitor similarly situated.

THE LAW

Only brief reference is necessary to indicate to the litigants the court's awareness of its responsibility and of the legal principles which must serve as guides in the matter of the divestiture ordered. In *Gilbertville Truck Co.* v. *U.S.*, 371 U.S. 115 at 130, the obligation of the court here is expressed as a "heavy responsibility" to afford a remedy consistent with the facts before it "with as little injury as possible to the interests of private parties or the general public."

The Supreme Court in *U.S.* v. *duPont & Co.*, 366 U.S. 316 outlines in concise language the principal factors which must guide the court in the solution of the problem involved. It is generally recognized and specifically mentioned in the above decision that District Courts are vested with a "large discretion" in affording ultimate relief. The discretion however must be exercised in the light of the purpose of the statute and the circumstances involved. The relief to be granted must not be punitive but an effective remedy is not to be discarded solely because it will invoke an economic hardship. Divestiture is the most important of antitrust remedies and must be considered by the

court. The relief granted is usually found in some form thereof. The protection of the public interest is the purpose of the statute and it is served when a violation of the statute has been found and the relief effectively pries open to competition a market that has been closed by defendant's illegal restraints. There is no serious dispute as to the above principles but the application thereof under the circumstances of this case has been and is a matter of definite controversy. We then turn to the facts, circumstances and equities as this court finds them which have prompted the judgment referred to above.

THE SUPREME COURT DECISION

In the original action in this court, the plaintiff contended that the statute had been violated, by the merger by acquisition of the two defendants, in ten separate lines of commerce. This contention was rejected by this court as to each separate line. It appears without contradiction that on appeal to the Supreme Court, the plaintiff contended that this court had committed legal rather than factual error insofar as the decision found no violation of law as related to the lines of commerce designated as aluminum conductor wire and cable and insulated or covered aluminum wire and cable. The Supreme Court, in its decision, upheld plaintiff's contention so that the violation ultimately found relates only to a comparatively small segment of the business conducted by Rome prior to the merger. The controversy then only involves aluminum conductor products and will so be referred to in this decision.

A considerable argument has been advanced by the plaintiff to the effect that the Supreme Court decision in itself mandated the complete [divestiture] by Alcoa of all of the assets acquired from Rome and

the restoration of Rome as a viable competitive entity. For all practical purposes, it is urged that this court has no alternative but to direct the restoration of Rome as it existed prior to its acquisition. This court is unable to completely adopt such argument. If the Supreme Court had intended to limit or nullify the equitable powers which are ordinarily reserved to the trial court, there would seem to be no reason why the proceding should have been remanded. A simple direction to enter a final judgment in accordance with the above argument would have been sufficient. Divestiture may be accomplished in many ways and this court concludes that the Supreme Court did not intend to relieve this court of its obligation to determine the nature of the relief which must be granted or to confine same in an inflexible mould.

THE PLANTS

Rome, at the time of the acquisition, maintained manufacturing facilities at Rome, New York; Torrance, California; and Collegeville, Pennsylvania. It may be said that the principal facility was located at Rome, New York and employed at that plant about one thousand persons. This facility was engaged primarily in the manufacture of copper products, including wire and cable. It was at that plant, however, that the aluminum conductor products were manufactured which was the basis of the holding that the acquisition was in violation of the statute. The Torrance, California plant principally manufactures rigid steel conduit and tubing. The plant at Collegeville, Pennsylvania manufactures cable troughs, ladders and ducts for supporting or enclosing electrical conductors. Neither the Torrance nor Collegeville plant contained facilities for the manufacture of electrical conductors. There has been and is no contention that

either plant was engaged in or possessed the facilities to manufacture the items upon which the violation of the statute was found.

The plaintiff, prior to the hearing of October 4, 1965, presented no actual plan or procedure by which the mandate of the Supreme Court may be accomplished. Its proposed judgment simply provides that Alcoa "shall divest itself of all ownership of Rome and re-establish Rome as an independent and viable competitor". Jurisdiction in the court is to be retained only to permit implementation of the above direction. Same is construed to foreclose any consideration of the adequacy of a partial divestiture or any other type of relief in the event that a sale of the assets to a purchaser, satisfactory to the court, cannot be made.

As already indicated, both litigants have been unable to agree upon the provisions of the judgment as discussed at the conference of February 4, 1966. Both the plaintiff and Alcoa have subsequently submitted their version of such judgment which contains both a direction to Alcoa to divest itself of the Rome properties and the procedure to be followed to accomplish same. Neither of said proposed judgments has been adopted in all detail and discussion of same would seem to serve no useful purpose.

THE PLANS OF DIVESTITURE

About December 1, 1964, Alcoa submitted a proposed final judgment and plan of divestiture which will be referred to as the Triangle Plan. In effect, it provided for a partial divestiture of the assets obtained by the acquisition of Rome, limited to the offending aluminum conductor lines of commerce. Since same is not adopted by the court at this time, only brief reference will be made thereto.

The plan provided for the elimination of the offending aluminum conductor lines of commerce as a product of the Rome plant. It in effect is intended to divest the aluminum conductor portion of Rome's business, the acquisition of which was found to be in violation of the statute, to transfer the competition afforded thereby to Triangle, together with certain machinery, good will and trademarks. It bound Alcoa to cooperate with Triangle in the matter of the expansion of Triangle's aluminum conductor business to the end of creating a competitor in the above lines of commerce, with a potential equal or greater than that possessed by Rome. This plan was strenuously opposed by the plaintiff and this court is not inclined to adopt it at this stage of the proceeding or at least until another less speculative plan is tested.

In March 1965 an alternative judgment was submitted by Alcoa which has come to be known as the Kaiser Plan. It provided in substance that Alcoa be directed, within a stated time period, to sell the assets acquired from Rome to a purchaser. It provided that the upset price to Alcoa, payable by a purchaser, be based upon the adjusted book value of the land, plants and equipment and the book value of materials or inventories as of the date of sale, same to include the capital expenditures made by Alcoa up to that date, the purchaser to assume the obligations of Alcoa insofar as the rights of employees are provided for in the existing labor and pension payment obligations. It was further provided that if Alcoa is unable to sell the plants within the time period set forth and in accordance with the price provision referred to above, that Alcoa should have the right to apply to the court for a determination by the court, Alcoa shall be relieved from further obligations to

sell the plants. This plan of divestiture was likewise strenuously objected to by the plaintiff, especially as to the two provisions referred to above. In other words, the plaintiff opposed both the upset price provision and the provision which would ultimately allow Alcoa to keep the properties upon a finding by the court that a good faith effort to sell same had been made.

The Kaiser Plan or judgment follows the provisions of the consent judgment in the civil action entitled *United States* v. *Kaiser Aluminum and Chemical Corp.*, Civil Action No. 2795, District of Rhode Island. It is difficult to answer Alcoa's contention to the effect that so long as the Kaiser Plan is recognized by the government as equitable and in the public interest, that it should be afforded the same relief upon a showing that the circumstances are so similar in the matter of the underlying considerations as to be practically identical. The Government's answer to this contention is something less than satisfactory.

The judgment herein generally follows the judgment in the so-called Kaiser case except that the provision in the latter plan, which permits Kaiser to retain the acquired assets upon a finding of the court that a *bona fide* effort to sell same was without result, has been eliminated. The reason for this action is apparent without extended explanation since such provision permits the offending party to retain the competitive advantage, the acquiring of which has been held to be in violation of the statute. The upset price provision in the Kaiser judgment has been retained herein for several reasons. In the first place, the court is impressed that the broad line of copper products manufactured by Rome and the somewhat more limited line of aluminum products manufactured by Rome necessarily restricts as eligible purchasers

those presently involved in the manufacture of similar products since by acquiring Rome assets, they may run afoul of the antitrust laws. This situation leaves the most likely purchaser to individuals or firms not presently engaged in the manufacture and sale of competing products. The ultimate object to be attained is the restoration of Rome under an ownership which in good faith intends to continue its operation in the future as an active competitor in the sale of the products which it manufactures. Neither the public nor local interests will be served if the Rome properties be transferred under court order to anyone whose purpose is dedicated to a short term profit or to the piecemeal disposition of its assets. It is not intended however that Alcoa should automatically reject any and all purchase offers which do not meet the upset price. The provision in the present judgment is intended to eliminate speculators but not to automatically exclude purchasers showing an ability and an intention to continue Rome as an active competitor in its field.

MATTERS CONSIDERED IN ARRIVING AT THE JUDGMENT HEREIN

Since the court has here adopted substantially all but one of the provisions of the Kaiser judgment, it would seem incumbent that the factual and legal bases for such action be discussed or enumerated.

It is realized that, generally speaking, judgments based upon the consent of the litigants have little, if any, probative force in subsequent litigation involving a different defendant. *U.S. v. duPont & Co.*, supra, footnote 12, page 330. Here, however, we have such a similarity of facts as to warrant the consideration of the Kaiser judgment in exercising the equitable obligation imposed upon the court. The plaintiff here has asserted in unequivocal language that the Kaiser ac-

quisition "fostered" several similar acquisitions including the acquisition of Rome by Alcoa. This fact is recognized by the Supreme Court in *United States v. Alcoa*, supra, in note 6 on page 279 as a factor influencing Alcoa's decision to acquire Rome about two years later. Likewise the plaintiff conceded by its own statement that Rome was approximately the same size as the company acquired by Kaiser which, like Rome, "was one of the leading non-integrated fabricators of aluminum and other kinds of wire and cable". Likewise the plaintiff recognized prior to the entry of the Kaiser judgment that "Alcoa ranked second only to Kaiser in the production of insulated and covered aluminum wire and cable". The above concessions or assertions by the plaintiff would seem to require the consideration by this court of the terms of the Kaiser judgment since it can be fairly assumed that the plaintiff does not seek to place one competitor in a more unfavorable position than another in the same line of business.

Proceeding a bit farther, it is established that the same aluminum conductor line of commerce upon which the Supreme Court decision was based here was likewise involved in the Kaiser litigation. Additionally the public interest, which is the primary consideration in this type of litigation insofar as economics are concerned, is strikingly similar in both litigations. The effect of divestiture upon the economic condition of the local community involved is a factor to be considered in the matter of the public interest as a whole. Here the two geographic areas involved to wit: Utica-Rome, New York and the Providence-Pawtucket, Rhode Island—were classified, at the relevant times involved, as depressed areas insofar as the labor market is concerned. In fact, the Utica-Rome

area appears to be more seriously affected since any change in status therein is occasioned by out migration of labor while the change in the Rhode Island area appears to result from the increase in work force thereto. The present action was brought to trial and the decision of the Supreme Court was made prior to the entry of the Kaiser judgment. As long as it is conceded that the Kaiser acquisition fostered the Rome acquisition, it is not unlikely that the Supreme Court decision in the instant case afforded the motivation for the consent decree under discussion.

All of the above has prompted this court to adopt the Kaiser judgment in all but one of its essential parts. The following quotation, taken from *International Business Machines Corp. v. U.S.*, 343 F. 2d 914 at 920, is appropriate. "Equality of treatment is so dominant in our understanding of justice, that discretion, where it is allowed a role, must pay the strictest heed". If parity in the levying of taxes is essential to free and fair competition, as stated in the above decision (p. 923), such competition is impeded where an inequality is imposed upon competitors acting in closely related violations and involving similar circumstances.

There can be no serious contention that Rome's need for additional capital expenditures or its record of earnings arises from mismanagement, since the acquisition by Alcoa. They are rather the result of market conditions concerning which considerable evidence was taken upon the hearing. Judge Dawson found the same condition in *United States v. Kennecott Copper Corp.*, 231 F. Supp. 95 at 104. The plaintiff pays Alcoa a compliment as to its management and as to the operation of the Rome facilities. Same

is found in plaintiff's brief submitted October 4, 1965, after the hearing in support of its contentions and is set out in the footnote below.[1]

In the course of the hearing in this proceeding, considerable evidence was received from community leaders, executives and labor representatives as to the detrimental effect of a divested Rome on the Rome facilities. Same has not been overlooked in the preparation of this judgment. It is intended to afford an opportunity to test the availability of total divestiture which appears to be a preferred remedy in similar antitrust proceedings. At the same time, it is intended to be elastic enough so as to leave the door open for further consideration of the application of other remedies or types of divestiture in the event that no purchaser, dedicated to the continuance of

[1] "The various Rome facilities have been staffed and continue to be staffed with competent personnel, some of whom before the merger occupied positions of responsibility in the Alcoa organization. Rome's production facilities, research and engineering programs, employee policies, procurement and accounting procedures, patent position, market contacts and product lines have all been preserved or improved during Alcoa's stewardship of Rome. There have been extensive improvements to the operating facilities through the expenditure of over $5 million. Abandoned facilities have been replaced by facilities of equal or better quality. Rome's procurement practices have been afforded a higher degree of autonomy than any other part of the Alcoa operation. Rome presently has excellent top level management. Its product line has been maintained and even expanded to keep pace with the industry, and Alcoa has preserved and expanded Rome's market contacts. Rome's research capabilities and patent position have been improved substantially since the acquisition; its accounting and procurement procedures have been improved by bringing them into conformity with procedures utilized by Alcoa."

Rome as an active competitor, is found. The judgment is not to be construed in any manner as forecasting the elimination of Rome's position in the business world it has occupied or in the local competition in which its facilities exist.

The entry of the judgment, filed simultaneously with this memo, is therefore directed, and it is

So ordered.

STEPHEN W. BRENNAN,
Senior U.S. District Judge.

Dated: April 27, 1966.

United States District Court
Northern District of New York

Civil No. 8030

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALUMINUM COMPANY OF AMERICA AND ROME CABLE CORPORATION, DEFENDANTS

FINAL JUDGMENT

The Supreme Court of the United States, by its opinion dated June 1, 1964, having reversed the Judgment of this Court, entered in this cause on January 28, 1963, the Supreme Court having determined that the acquisition by defendant Aluminum Company of [illegible] of the business and assets of defendant Rome Cable Corporation is in violation of Section 7 of the Clayton Act, 15 U.S.C. 18; and the Supreme Court having remanded this cause to this Court for proceedings in conformity with its opinion; now, therefore, it is hereby

Ordered, Adjudged and Decreed as follows:

I

As used in this Final Judgment:

(A) "Person" means any individual, partnership, firm, corporation, association, trustee or other business or legal entity.

(B) "Eligible Purchaser" means any person, firm, or corporation approved by the Court.

(C) "Alcoa" means defendant Aluminum Company of America, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal office at Pittsburgh, Pennsylvania.

(D) "Rome Cable" means defendant Rome Cable Corporation (a wholly owned subsidiary of defendant Alcoa), a corporation organized and existing under the laws of the State of Delaware, with its principal office at Rome, New York.

(E) "Plants" means all of Rome Cable's manufacturing and production facilities (including lands, buildings, research laboratory, and all improvements effected between the time of acquisition and the time of sale) located at Rome, New York, Torrance, California and Collegeville, Pennsylvania, together with the machinery and equipment, raw materials, operating supplies, work in process, finished goods, and other inventory items located at the Plants or produced at the Plants and located elsewhere, and including also, the Rome Cable name, trademarks and good will.

(F) "United States" shall mean the United States of America, its territories and possessions.

II

Alcoa's acquisition of the business and assets of Rome Cable violates Section 7 of the Clayton Act, 15 U.S.C. 18.

III

The provisions of this Final Judgment applicable to Alcoa shall also apply to its directors, officers, agents, and employees and to its subsidiaries, successors and assigns, and to all other persons in active concert or participation with Alcoa who have received actual notice of this Final Judgment by personal service or otherwise. This Final Judgment shall not apply or relate to the activities or operations of Alcoa outside of the United States. None of the provisions of this Final Judgment shall apply to any person or persons who acquire any of the assets disposed of pursuant to this Final Judgment.

IV

(A) Alcoa is ordered and directed, within six months from the entry of this Final Judgment, to sell the Plants to an Eligible Purchaser which will operate the Plants as an operating business in competition with other firms engaged in the manufacture, production and sale of electrical conductor wire and cable products, conduit and cable installation devices. The net price to be paid to Alcoa for the Plants shall be no less than the total of:

(a) The adjusted book value of the land, plant and equipment of the Plants as of the date of sale, said adjusted book value being $16,338,040 as of December 31, 1964;

(b) The book value as of date of sale of all raw materials, operating supplies, work in process, finished goods, plant inventories and finished goods inventories as the same appears on the books of Rome Cable before deducting reserves for life, except, however, that said book value shall be adjusted to include aluminum, copper and steel content at market value as of date of sale;

(c) The amount of additional expense incurred by Alcoa for pension and termination pay payments, as provisions therefor, relative to employees of the Plants resulting from the fact that the pension and termination pay plans for said employees were [illegible] the time of acquisition by Alcoa, and

(d) All incidental expenses relative to the sale of the Plants and the transfer of said assets.

Without limiting the generalities of the foregoing, Alcoa may at any time make capital additions to the Plants and the book value thereof shall be included in the purchase price. In addition, the purchaser shall agree to continue pension and termination payment plans for the employees of the Plants, other employee benefits, and conditions of employment, upon terms no less favorable than those provided by Alcoa and shall assume all of the obligations of Alcoa relative to said pension and termination payment plans and to conditions of employment applicable to both past and existing employees of the Plant. In the event the full net price is not payable to Alcoa in cash, the terms and conditions of payment shall be such as are acceptable to Alcoa.

(B) If Alcoa is unable to sell the Plants as hereinbefore provided within six months from the date of entry of this Final Judgment, Alcoa may upon notice to the plaintiff be ordered to continue its efforts to sell the said Plants in accordance with the provisions of Paragraph IV(A) hereof for an additional three months, except upon a showing by defendants that there is no reasonable probability that the Plants can be sold within such extended period of time. If Alcoa is unable to sell the Plants within such extended period of time, or at the end of the original six months period if no extension of time is ordered, Alcoa shall

have the right to apply to the Court, on notice to plaintiffs, for a determination that it has made a *bona fide* effort to sell the Plants and has been unable so to do, in which event and on such determination by the Court, the Court may in its discretion,

(1) order that Alcoa be relieved from further obligation to sell any one of all the Plants; or

(2) order Alcoa to cease for a period of five years the manufacture in the Plants of the overlap aluminum conductor products, namely, bare all-aluminum cable and aluminum conductor steel reinforced in distribution sizes, insulated cable covered wire, and aluminum multiplex cable; or

(3) order Alcoa to divest to an Eligible Purchaser Rome Cable assets utilized in the manufacture, distribution and sale of said overlap aluminum conductor products; or

(4) upon good cause shown by either party, after appearing to the Court, order such other and different relief as shall appear to the Court to be appropriate in the circumstances.

(C) Alcoa shall make known the availability of the Plants for sale by customary and usual means. Alcoa shall furnish to bona fide prospective purchasers all reasonable information regarding the Plants had the specific consent so to do by Alcoa thereto, and shall permit them to make such inspection of the Plants as may be reasonably necessary for the above purpose.

[illegible] and affected by this [illegible] made in good faith and shall be [illegible] provided, however, that [illegible] may cause [illegible] of any [illegible] purchaser [illegible] any [illegible]

tion of the purchase price therefor, or performance of the sale transaction, and may also influence any other of the terms and conditions of the sale transaction as therein provided or as provided by [illegible]; provided, further, that should the Plants be returned to the control of Alcoa, it shall then dispose of the Plants in accordance with the provisions of this Section IV, with the time period to be computed from the date of the return of control.

V

If at any time during the periods prescribed by Paragraphs IV (A), (B), (C), and (D), Alcoa is in a position to effect divestiture of Rome as required therein, it shall inform the Court and the plaintiff of the details of its proposed plan of disposal. The effectuation of any such proposed plan of disposal shall be subject to the approval of the Court, after appropriate notice to plaintiff.

Upon petition of the plaintiff or upon the motion of the Court within the time periods above mentioned, Alcoa shall furnish such information as to the status of the proceeding ordered herein, as the Court shall direct.

VI

After the sale of Rome pursuant to this Final Judgment, no person shall, at the same time, be (1) an officer or director of Alcoa and (2) an officer or director of the purchaser of Rome.

VII

Alcoa is enjoined and restrained for a period of five years from the effective date of this Final Judgment from acquiring

(1) Any capital stock of any corporation which is engaged in the manufacture of electrical conductor wire and cable products in the United States; or

(2) All or any part of the assets (except for the purchase of products, commodities, machinery or equipment in the normal course of business) of a person engaged in the manufacture of electrical conductor wire and cable products in the United States.

This Final Judgment shall not prohibit Alcoa from acquiring in good faith the stock or assets of any person in the exercise of any security or debt or liability enforcement process, whether provided by law or bona fide agreement, so long as Alcoa shall dispose of such stock or assets within a reasonable period of time.

VIII

For the purpose of determining or securing compliance with this Final Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Alcoa at its principal office, be permitted:

(1) Reasonable access, during office hours of Alcoa, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Alcoa relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of Alcoa and without restraint or interference from it, to interview officers or employees of Alcoa, who may have counsel present, regarding any such matters.

For the purpose of securing compliance with this Final Judgment, Alcoa, upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and upon reasonable notice made to its principal office, shall submit such reasonable reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may, from time to time, be necessary for the enforcement of this Final Judgment. No information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the executive branch of plaintiff except in the course of court proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

IX

Alcoa shall pay all taxable costs.

X

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, the modification or termination of any of the provisions thereof, for the enforcement of compliance herewith, and for the punishment of violations hereof.

Charles W. Bunn,
District Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 271

UNITED STATES OF AMERICA, *Appellant*

v.

ALUMINUM COMPANY OF AMERICA AND
ROME CABLE CORPORATION

On Appeal From the United States District Court for the Northern District of New York

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees Aluminum Company of America and Rome Cable Corporation move that the judgment and order of the district court be affirmed.

STATEMENT

This is a direct appeal from a final order of the district court approving the sale of Rome Cable Corporation ("Rome") to The Okonite Company ("Okonite"), a subsidiary of Ling-Temco-Vought, Inc. ("LTV"). The challenged divestiture is complete and

unqualified, with Alcoa retaining no equity, debt, security or other interest in any part of the Rome assets (J.S. 2a).[1] The Government's appeal raises two questions: first, whether the court should have approved the sale at this time in view of alleged actual and potential competition between Rome and Okonite (J.S. 8-20); and second, whether the district court's decree, pursuant to which the challenged sale was made, was an appropriate divestiture order (J.S. 21-24). It is appellees' position that the decree and the divestiture ultimately approved effectively redress the violation found by this Court and fall well within the discretion entrusted to courts of equity in fashioning equitable relief in the public interest.

In *United States* v. *Aluminum Company of America*, 377 U.S. 271, 281 (1964), this Court held that Alcoa's acquisition of Rome violated Section 7 of the Clayton Act and remanded the case for divestiture proceedings in conformity with its opinion. Pursuant to this mandate, the district court held two evidentiary hearings[2] which led to (1) the entry of a final judgment patterned, with important exceptions, after the final judgment entered by consent in the case of *United States* v. *Kaiser Aluminum & Chemical Corp.*, Civil No. 2795 (D.R.I.); and (2) an order approving the sale of Rome to Okonite. These relief proceedings, and the district

[1] The district court's Memorandum Decision and Order approving the sale of Rome to Okonite is set out as Appendix A to the Government's Jurisdictional Statement (J.S. 1a-15a). The court's earlier Memorandum Decision and Order adopting the Final Judgment herein appears in Appendix B (J.S. 16a-28a). The Final Judgment itself is set out at J.S. 28a-35a.

[2] The transcript of the first relief hearing, held October 4-7, 1965, will be referred to as "Tr. I"; the transcript of the second relief hearing, held November 2-4, 1966, will be referred to as "Tr. II."

court's findings and orders based thereon, provide the background for this appeal.

1. The Proceedings Relating to the Final Judgment

In the first relief proceedings, defendants urged that in the circumstances of this case it would be appropriate to adopt a divestiture decree similar to the decree previously accepted by the Government in the *Kaiser* case, *supra*.[3] This proposal, referred to as the "Kaiser Plan," contemplated a sale of Rome within a period of nine months at not less than an "upset" price to be computed on the basis of the adjusted book value of the Rome assets, including all land, plants, equipment, inventories, and work progress.[4] It was further provided, as in the *Kaiser* judgment, that upon a determination by the district court that Alcoa had made a *bona fide* but unsuccessful effort to dispose of Rome, it would be relieved of any further obligation to sell (*id.*). This full retention provision was rejected by the court (J.S. 23a), and is not properly involved in this appeal.[5]

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[3] In addition, the defendants presented, as an alternative, a plan of partial divestiture under which Triangle Conduit & Cable Co., previously only a manufacturer of copper wire and cable products, would acquire all of Rome's equipment, technical know-how, good will, customer lists, etc. associated with the manufacture and sale of the aluminum conductor products manufactured by both Alcoa and Rome prior to the merger, and Alcoa would be restrained from the manufacture of such products in the Rome plant. The effect of such plan, had it been adopted, would have been to give to Triangle a role in the aluminum conductor market substantially identical to that formerly served by Rome and to leave Alcoa in possession of the Rome facilities used and useful in the manufacture of products not previously made by Alcoa, and as to which, therefore, the merger had not increased concentration. The district court rejected the Triangle plan (J.S. 22a).

[4] Proposed Final Judgment submitted by defendants, February 25, 1966.

[5] *But see* J.S. 24, and discussion *infra*, p. 27.

The evidence in the first relief hearing showed that Rome's wire and cable earnings had dropped by nearly $3 million from March 1957 to March 1958, that by the end of March 1959, when the acquisition occurred, Rome's wire and cable operations were already losing money, and that in the five years 1960 through 1964, Rome's wire and cable losses totalled more than $15 million, with a loss in 1961 alone of more than $4.2 million.[6] These losses, concededly, were not due to any mismanagement by Alcoa (J.S. 26a-27a), but were the result of an industrywide depression from which other wire and cable fabricators had also suffered (J.S. 26a; see DXR 11).[7] The uncontradicted testimony of experienced businessmen and labor and community leaders indicated widespread concern for the economic future of Rome (J.S. 27a, Tr. I, 473-75, 502, 513, 517). Thus, the record demonstrated

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[6] Rome's earnings and loss record, broken down among wire and cable, conduit and accessory products, from 1956 through the first half of 1965, is shown in DXR 9, from which the following tabulation of wire and cable earnings and losses is abstracted:

ROME PLANT (Wire and Cable) EARNINGS AND LOSSES

1956 (3/31/57)	$3,791,977	1961 (Cal. Year)	(4,231,128)
1957 (3/31/58)	844,680	1962	(3,843,419)
1958 (3/31/59)	(347,279)	1963	(3,731,189)
1959 (12/31/59)	(200,511)	1964	(794,387)
1960 (Cal. Year)	(2,461,975)	1965 (6 months)	1,201,477

Earnings and losses for Rome as a whole followed a generally similar pattern.

[7] As Judge Dawson found in United States v. Kennecott Copper Corporation, 231 F. Supp. 95, 104 (S.D.N.Y. 1964): "Since 1958, insulated wire and cable have been continuously falling due to overcapacity. This has been an industry-wide situation except for paper insulated power cable. Meanwhile the price of copper has remained relatively stable. Profit margins on insulated wire and cable have therefore dwindled so that many companies are now showing losses."

the desirability of a decree that would tend to assure a new ownership for Rome ready and able to maintain and improve its operations (J.S. 5a, 26a).[8] As the court concluded,

> The ultimate objective to be attained is the restoration of Rome under an ownership which intends to continue its operation in the future as an active competitor in the sale of the products which it manufactures (J.S. 24a).

The above-mentioned *Kaiser* judgment, to which the court referred in framing its decree, arose out of the Government's attack on Kaiser's 1957 acquisition of the Bristol, Rhode Island, plant of U. S. Rubber, an acquisition which this Court found was "specifically identified as [one of the] factors influencing Alcoa's 1959 decision to acquire Rome."[9] *United States* v. *Aluminum Company of America, supra,* 377 U.S. at 279, note 6.

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[8] While Rome has been profitable since 1965, the record shows that this was due to increased defense procurement and a shortage of copper, unusual market conditions that are not expected to last indefinitely (J.S. 5a; Tr. I, 93-94, 389, 517, 524, 530; Tr. II, 200-01).

[9] The district court found, and the record plainly shows, that the Government itself had "asserted in unequivocal language that the Kaiser acquisition 'fostered' several similar acquisitions, including the acquisition of Rome by Alcoa"; that the Government had conceded that "Rome was approximately the same size as the company acquired by Kaiser which, like Rome, 'was one of the leading nonintegrated fabricators of aluminum and other kinds of wire and cable'"; that Alcoa ranked second to Kaiser in the insulated and covered aluminum wire and cable field; and that because of the substantial factual and legal identity of the two cases, it was "not unlikely that the Supreme Court decision in the instant case afforded the motivation for the consent decree under discussion" (J.S. 24a-26a).

The record shows that after this Court's decision in the present case, the Antitrust Division was informed that an order of divestiture in the *Kaiser* case might threaten the continued existence of 700 jobs in the already depressed Bristol area. The Division assured Rhode Island officials that "the Government will under no circumstances urge relief in this case which would result in the closing of the plant" (DXR 3). Thereafter, the Government entered into a consent judgment having two key features: a minimum or "upset" price below which Kaiser was not required to sell, and an automatic retention provision which permitted Kaiser to retain the plant if, despite a *bona fide* attempt to do so, it was unable to make a sale (DXR 4).

The district court, while recognizing that "generally speaking, judgments based upon the consent of the litigants have little, if any, probative force in subsequent litigation involving a different defendant," found in this case "such a similarity of facts as to warrant the consideration of the Kaiser judgment in exercising the equitable obligations imposed upon the court" (J.S. 24a).[10] Upon such consideration, however, the court rejected the automatic retention provision of the Kaiser Plan "since such provision permits the offending party to retain the competitive advantage the acquiring of which has been held to be in violation of the statute" (J.S. 23a),

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[10] In addition to the substantial identity of the two cases on the merits (note 9, *supra*), the court found that economic conditions in the Bristol, Rhode Island and Utica-Rome communities were also "strikingly similar," with both areas having been classified by the United States Government as depressed labor areas (J.S. 25a).

Accordingly, the court ordered "total divestiture" (J.S. 27a), directing Alcoa in good faith to sell the Rome business and assets within a period of six months to an eligible purchaser. The court reserved for further consideration both an extension of this initial divestiture period and the possible "application of other remedies or types of divestiture in the event that no purchaser, dedicated to the continuance of Rome as an active competitor, is found" (J.S. 27a-28a, 31a). The "upset" price feature of the Kaiser Plan was retained, but with express qualifications. As the court held (J.S. 24a):

> It is not intended . . . that Alcoa should automatically reject any and all purchase offers which do not meet the upset price. The provision in the present judgment is intended to eliminate speculators but not to automatically exclude purchasers showing an ability and an intention to continue Rome as an active competitor in its field.

2. The Proceedings Relating to Approval of the Okonite Sale

As required by the judgment (J.S. 32a), Alcoa prepared a brochure describing the Rome properties and soliciting purchase offers (DXR 50). This brochure was distributed to 153 persons, firms, and corporations (Tr. II, 49; GX 811). At least 32 of those contacted expressed a further interest in the purchase, and, after appropriate follow-up, negotiations were carried forward with 19 firms (Tr. II, 52), of which five (including LTV) either made or were prepared to make offers (Tr. II, 54, 61-63, 65-69, 72-78). The terms proposed by four of the prospective purchasers involved retention by Alcoa of substantial debt or equity interest in Rome (*id.*), amounting in some cases

to potential working control (Tr. II, 190-192).[11] Only LTV, on behalf of its Okonite subsidiary, offered to purchase Rome on an all-cash basis.

On October 13, 1966, defendants petitioned the district court for approval of the sale of Rome to Okonite. After full discovery by the Government and an evidentiary hearing, the district court on December 21, 1966, rendered its memorandum decision and on January 20, 1967, entered its final order approving the sale (J.S. 1a-15a).

The court pointed out that Alcoa's acquisition of Rome had been found by this Court to violate Section 7 of the Clayton Act only with respect to the aluminum conductor line of commerce (J.S. 6a). Finding Okonite to be neither an actual nor a significant potential manufacturer of aluminum conductor products (J.S. 6a, 9a), the court ruled that "the anti-competitive effects fatal to the Rome-Alcoa merger will be entirely eliminated under the proposed plan" (J.S. 6a).

Recognizing the existence of some overlap between the copper wire and cable products of the two companies, the court found, however, that such overlap occurred in only four of ten Census product classifications and that in three of those categories the extent of overlap was minimal (J.S. 7a-8a). As to the fourth classification, power wire and cable, the court ruled that any overlap there was more theoretical than real since "Okonite's three largest products [in that category]

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[11] Typical of these offers was the Universal American Corporation's proposal to finance the purchase of Rome by issuing to Alcoa $10 million worth of a Universal non-convertible preferred stock, with the balance of the price—some $23 or $24 million—to be secured by subordinated 6 per cent debentures in the New Rome Cable Corporation (Tr. II, 62-63).

account for about eighty-three percent of its total power cable shipments, none of which is manufactured by Rome" (J.S. 8a). The court concluded that "the overlap products manufactured by Rome and Okonite are insignificant competitive factors as between the two organizations" (*id.*).

As to potential competition, the court rejected as "directly contrary to the evidence produced" (J.S. 9a) any contention that either Rome or Okonite is "'waiting anxiously'" to enter the markets of the other (J.S. 9a-10a). Detailing the historically different product orientations of the two companies (J.S. 7a, 9a) and referring to the financial barriers to internal expansion (J.S. 10a), the court held (*id.*): "Here there is no evidence that in the foreseeable future either Rome or Okonite plans to or is capable of entering a product field other than it now occupies."

Noting that the Government had avoided any contention that the sale of Rome to Okonite would violate the antitrust laws (J.S. 11a), and taking into account the financial insecurity of Rome (J.S. 5a) and the detriment to its viability of further delay (J.S. 11a), the court found not only that there were no more than minimal anti-competitive implications but that there were affirmative benefits. The court concluded (J.S. 11a):

> The offer made constitutes a clear, clean and complete divestiture by Alcoa of Rome's assets. It obviates many, if not most, of the objections which are generally advanced in similar proceedings. It eliminates the unrest among Rome's personnel and assures them of a strong aggressive employer who has given assurance as to the continuance of Rome's presently located three manufacturing

plants. It should tend to stop Rome's loss of technical help to other employers and restore a sense of security which, understandably, has been missing since the order of divestiture. The benefit to be obtained by the closing of this litigation at this time would seem to far outweigh any speculative advantage which would result from further delay.

ARGUMENT

The Government does not claim that the proposed sale would violate Section 7 or even that Okonite is disqualified as a purchaser of Rome "under all conceivable circumstances" (J.S. 11, note 8). It claims, rather, that the district court should have withheld its approval pending a further search for "more satisfactory alternatives" (*id.*). As expressed in the district court, it is the Government's position that "competitive problems are sufficiently likely that [the court] should not *at this time* approve the proposed sale . . . but should require Alcoa to continue its attempt to sell Rome to a *more acceptable* purchaser.[12]

The court found, however, that the "competitive problems" cited by the Government[13] were not substantial and that the positive benefits of the proposed sale "far outweigh any speculative advantage which would result from further delay" (J.S. 11a). The benefits noted by the court included, in particular, the com-

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[12] Memorandum in Opposition to Defendants' Petition for Approval of its Proposed Plan of Disposal, p. 13 (emphasis added).

[13] Such problems relate solely to alleged actual and potential competition between Rome and Okonite. The Government made no objection based on the business activities of LTV, Okonite's parent company (Tr. II, 504).

plete elimination of the violation found by this Court in the aluminum conductor line of commerce, the immediate transfer of Rome to strong ownership committed to the continuance of Rome as a viable competitor, and, not least, the termination of the litigation itself. The court's determination, we submit, reflects a balanced, practical assessment of the mix of facts before the court and raises no question of general importance for the administration of the antitrust laws requiring plenary consideration by this Court.

I

THE SALE OF ROME TO OKONITE WOULD CONSTITUTE COMPLETE AND EFFECTIVE EQUITABLE RELIEF IN THE PUBLIC INTEREST

The test of equitable relief is whether it is "effective to redress the antitrust violation proved." *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 323 (1961). Here, there is no dispute that the proposed sale, unlike the relief initially formulated in *duPont*, would accomplish complete, absolute and unqualified divestiture, with Alcoa retaining no vestige of interest in Rome. This much the Government concedes (J.S. 9).

It is likewise undisputed that Okonite does not manufacture aluminum conductor products (DXR 60). Hence, upon divestiture, Rome-Okonite would succeed to the role formerly occupied by Rome as a nonintegrated aluminum conductor fabricator. Indeed, since Okonite will bring greater financial and other resources to Rome, the combination is likely to be a stronger, more vital independent force in the aluminum conductor market than was premerger Rome (*see infra*, pp. 22-23). In short, the proposed sale irrevocably

breaks up the Alcoa-Rome merger and returns a strong independent to the aluminum conductor market.

The Government objects, however, that the proposed sale would merely substitute "the merger of an actual and a potential competitor for the merger of two actual competitors . . ." (J.S. 15). This is a captious objection, for it is completely unrealistic to compare Okonite's alleged potential competition with Alcoa's position as the leading *actual* producer of aluminum conductor. In any event, the district court, applying the criteria spelled out in *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), and recognizing "that potential competition cannot be put to a subjective test" (J.S. 9a), rejected the Government's contention that Okonite is a significant potential competitor in the aluminum conductor field (*id.*).

The record unequivocally supports the court's conclusion. One salient fact, totally ignored by the Government, is that the aluminum conductor market is pre-eminently an *overhead* product market; as this Court noted, "[W]hile aluminum conductor dominates the overhead field, copper remains virtually unrivaled in all other conductor applications." *United States* v. *Aluminum Company of America, supra,* 377 U.S. at 274, 277. Okonite's production, however, has traditionally been confined to sophisticated high-voltage copper products used in underground and inside applications (J.S. 7a). Okonite has never made overhead products, and there is no evidence, and the Government does not contend, that it either desires or is under market pressure to shift from its traditional high-voltage, underground orientation to the manufacture of overhead products (*See e.g.*, Tr. II, 304-06). It is irrelevant that Okonite is contemplating the use of alumi-

num in certain underground applications (J.S. 15), since "aluminum's brittleness and larger size render it impractical"[14] in such applications. Thus, even if Okonite were to start using aluminum in underground products, this would not place it in the mainstream of aluminum conductor competition.[15]

Significant gaps in Okonite's aluminum conductor technology (J.S. 3a), its prior unsuccessful experience with aluminum conductor (*id.*), and its lack of acceptance in the market place as an aluminum conductor supplier (Tr. II, 401-02), all further substantiate the court's conclusion that Okonite does not satisfy the potential competition indicia outlined by this Court in *Penn-Olin*. In this connection, it is especially significant that Okonite, unlike premerger Rome, has no aluminum rod-making capability (Tr. II, 306, 332-34). This lack, as the Government has stressed in earlier phases of this proceeding, would place Okonite at a significant competitive disadvantage relative to integrated and semi-integrated fabricators having an aluminum rod technology.[16]

Moreover, while the primary objective in formulating relief is to redress the violation proved, courts are admonished to accomplish "this result with as little injury as possible to the interest of the general

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[14] United States v. Aluminum Company of America, *supra*, 377 U.S. at 277.

[15] As the Government showed in the trial on the merits, all of Alcoa's and upwards of 90 per cent of most other producers' aluminum conductor production was in the overhead field (GX 443, R. 2728).

[16] *See, e.g.*, Post-Trial Brief of the United States, p. 29.

public."[17] Thus, while here the court was concerned primarily with the proposed sale's remedial effects in the aluminum conductor field and its lack of significant adverse effect in other segments of the wire business (*See, infra*, pp. 16-23), it was also mindful that the interest of the general public would be served by approving the proposed sale at this time.

As noted, the court was concerned with the need to assure Rome's survival as a viable competitor.[18] In this regard, it was well satisfied that LTV and Okonite had the resources and intention "to maintain and expand [Rome's] position as a competitor in the market available to its products" (J.S. 4a). On the other hand, other firms that had expressed interest in Rome did not possess comparable managerial and financial resources (Tr. II, 79, 181, 191).

In addition, the court deemed it desirable to bring this litigation to a close without further delay. The record showed that because of uncertainty as to its future ownership, Rome was losing key employees, including sales managers, engineers, and research technicians, and was experiencing difficulty in hiring replacements for those who left and in recruiting new professional personnel (Tr. II, 104, 198-99). The court concluded that further delay would be "detri-

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[17] United States v. American Tobacco Co., 221 U.S. 106, 185 (1911), quoted in United States v. E. I. duPont de Nemours & Co., *supra*, 366 U.S. at 327-28.

[18] As to the appropriateness of such concern, see United States v. Continental Can Co., Inc., 1964 Trade Cases ¶ 71,264, p. 80,140 (S.D.N.Y. 1964), where the court noted that in circumstances similar to those of this case, the Government had conceded that the sale of the plants "without assurance of their continued full operation on a sound basis . . . would not be in the public interest and should not be directed by the Court."

mental to Rome's viability," whereas approval of the plan at this time "should tend to stop Rome's loss of technical help to other employers and restore a sense of security which, understandably, has been missing since the order of divestiture" (J.S. 11a).

There was, moreover, a real question whether further effort to sell Rome would have produced a "more eligible" purchaser than LTV-Okonite. As noted earlier, the availability of Rome was widely publicized, and negotiations were conducted with 19 firms, yet only five made or indicated their willingness to make an offer for Rome. Of these, the only all-cash proposal was by LTV, with each of the other four involving retention by Alcoa of a substantial interest in the new Rome organization. At the hearing, the court inquired if the Government would "not object to Alcoa holding stock in the purchaser," because if it would not, then "we could turn to somebody else besides this Okonite" (Tr. II, 172-73). Government counsel declined to state that the Government would approve a transaction in which Alcoa was left with an ownership position in the purchaser (*id.*). Thus, the court was justified in concluding that any future sale was likely to involve an incomplete divestiture of the type specifically condemned by this Court in the *duPont* case and, more recently, by the district court in *United States* v. *Aluminum Company of America and Cupples Products Corporation*, 257 F. Supp. 466 (E.D. Mo. 1966).

In sum, therefore, the court had before it a proposed divestiture that was complete and unqualified, that tended to assure the economic survival of Rome, and that, above all, effectively redressed the violation proved in the aluminum conductor field.

II

ALLEGED ANTICOMPETITIVE SIDE EFFECTS IN THE WIRE AND CABLE INDUSTRY DO NOT BAR THE PROPOSED SALE OF ROME TO OKONITE

As noted (*supra*, p. 10), the Government has not claimed even the reasonable probability of anticompetitive effect condemned by the Clayton Act, and has not foreclosed the eventual sale of Rome to LTV-Okonite. The Government's inability to claim illegality must be assumed to reflect a well-considered analysis of the case, for it had the proposed sale under study for nearly three months preceding the hearing and through prior litigation involving both Rome and Okonite was "well acquainted not only with the wire and cable industry as a whole but with the output of the facilities and the market status of the two corporations" (J.S. 11a). The Government's failure to claim illegality or to interpose any irrevocable opposition to the proposed sale reflects the fact that the claimed anticompetitive effects are not substantial.

The Government now claims that "Rome and Okonite were substantial producers of wire and cable, ranking eighth and ninth in the field . . ." (J.S. 16). In district court, however, the Government conceded that Okonite and Rome are "small in the wire and cable industry" and that both are "much smaller than their large integrated competitors . . ."[10] These concessions were dictated by market share percentages showing that in 1964 Rome had 1.6 per cent and

[10] Memorandum in Opposition to Defendants' Petition for Approval of its Proposed Plan of Disposal, pp. 6, 9, note 2.

Okonite 2.5 per cent of the insulated wire and cable industry, for a combined share of only 4.1 per cent (DXR 61).[20] Moreover, these percentages actually overstate the degree of competition between the two companies since, as shown below, the two companies have fundamentally different product orientations and have never been significant competitors of each other.

The Government's assertions that Rome and Okonite rank eighth and ninth, respectively, in the wire and cable industry (J.S. 4, 16) are flatly wrong and seriously overstate the effect of the proposed sale. In fact, the record shows that the Alcoa-Rome combination ranks eighth and Okonite ninth, but Rome alone, which is all that would be transferred to Okonite, ranks no better than fifteenth (DXR 56). Moreover, when Alcoa-Rome is broken up through divestiture, Okonite will rank eighth, and approval of this sale would not alter Okonite's ranking. It would still be eighth, still less than half the size of General Cable and smaller than other industry leaders by tens of millions of dollars in annual sales (*id.*). Thus, in terms of quan-

[20] It is surprising to find the Government now seeking to rely on unofficial and incomplete trade association (NEMA) statistics based only on shipments of members (J.S. 17, note 12), rather than on the official Census data which the Government itself has heretofore used in preparing its exhibits in this case regarding concentration, market shares and market rankings in the wire and cable industry (*see, e.g.*, GX 450, 451, R. 2731). Moreover, the Government's implication that LTV regarded NEMA data as authoritative is plainly misleading. As fully explained at the hearing, LTV used the NEMA data only for purposes of "a very preliminary early study" when it had NEMA data available to it but "did not have available census data" (Tr. II, 393).

titative measures, such as market share and industry rank, the effect of the proposed sale is minimal.[21]

While both Rome and Okonite are engaged in the wire and cable business, each has carved out an essentially different role in the industry. As the court found, Okonite specializes in sophisticated high-voltage copper cables, including paper and rubber insulated products, whereas Rome is essentially a manufacturer of less sophisticated lower voltage products using thermoplastic and thermosetting insulations (J.S. 7a). Thus, while Rome is heavily in building wire and overhead products, fields in which Okonite is not engaged at all, it does not make paper insulated or telephone cable, which are among Okonite's principal products (Tr. II, 202-04, 302-06, 327, 399-401). The effect of the combination, therefore, would be primarily to enable Okonite to obtain "aluminum and copper wire and cable products which will complement those already manufactured and sold by Okonite" (J.S. 4a).

The only exception is in the power cable classification, the only Census subcategory within the nonferrous wire drawing industry in which the Rome-Okonite combined share appreciably exceeds the companies' modest combined share for the insulating industry as

[21] While the Government now seeks to impugn the official Bureau of the Census statistics on which these market rankings are calculated (J.S. 4, note 4), it made no such claim in district court, and its present contention that the Census figures improperly include shipments of certain manufacturers is entirely *dehors* the record. As noted above (note 21), the Government itself consistently utilized the official Census data in preparing the exhibits it submitted in this case.

a whole.[22] And there, because of the companies' different product orientations, this apparent overlap has little competitive significance. Thus, Okonite's three largest products, accounting for approximately 83 per cent of its total power cable shipments, were not manufactured at all by Rome (DXR 63; Tr. II, 389); and, confirming Rome's low-voltage and Okonite's high-voltage orientations, the record shows that nearly 75 per cent of Rome's power cable shipments were in the under-601 volts category, whereas nearly 70 per cent of Okonite's shipments were in the 601 volts and higher category (*id.*). In short, basic differences in product orientation and emphasis nullify the competitive significance of the mere statistical overlap indicated in the power cable classification, a fact confirmed by uncontradicted nonstatistical evidence in this proceeding.[23]

Seeking to show a "significant" competitive overlap, the Government now isolates two minor subprod-

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[22] In 1964, product overlap was found in only 4 of 10 product subcategories within the nonferrous wire drawing industry. The overlapping product classes and the Rome-Okonite combined shares in each were as follows (DXR 62):

	1964		
	Rome	Okonite	Combined
Copper and copper-base alloy wire	1.2	2.1	3.3
Communications wire and cable	0.5	0.3	0.8
Power wire and cable	2.5	12.6	15.1
Other insulated wire and cable	3.8	1.0	4.8

[23] For example, at the trial on the merits, long before a sale to Okonite was even imagined, Rome did not include Okonite in a list of its leading competitors (R. 755). Similarly, Okonite's research department periodically evaluates cables produced by its competitors. No such analysis has ever been made of cables produced by Rome (DXR 65; Tr. II, 403-04, 409, 434).

ucts within the power cable classification in which the Rome-Okonite combined percentages are slightly above 10 per cent (J.S. 16). These are "portable power cable under 601 volts" and "thermoplastic power cable over 601 volts."[24] While the Government now appears to refer to such subproducts as "smaller lines of commerce" (J.S. 17), in the district court, it was careful not to describe any of such subproducts, or even the power cable category itself, as a "line of commerce" or by any of the generally accepted synonyms, such as "relevant market," "market," or "submarket."[25] The Government's reluctance even to claim that such minor subproducts constitute separate lines of commerce within the meaning of Section 7 is understandable, for they are essentially run-of-the-mill products that do not require specialized equipment or know-how but can be and are made interchangeably on standard wire and cable machinery. Indeed, as shown by GX 800, machinery presently being used for the production of thermoplastic power cable and portable power cable at both the Rome and Okonite plants is also being used simultaneously to make a variety of other wire and cable products. In short, there is absolutely no record support for the Government's glib assumption, now advanced for the first time, that these minor subproducts constitute economically significant submarkets within the meaning of Section 7.

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[24] Rome's and Okonite's combined sales of these products in 1963 represented less than ¼ of one per cent of total wire and cable industry shipments and less than 2 per cent of the industry's total sales of power wire and cable (DXR 62, 63).

[25] Instead, the Government used such terms as "product line," "field," "area," and "category." *See* Plaintiff's Post-Hearing Memorandum in Opposition to Defendants' Petition for Approval of its Proposed Plan of Disposal, pp. 5-6.

Turning now to the Government's equally tenuous claim of "significant" potential competition, the court did not rely on "disclaimers of managerial intent" in rejecting the claim that Okonite and Rome were potential competitors in the broader wire and cable industry (J.S. 18). Rather, the court relied on an impressive array of objective evidence showing little likelihood that either company would in the foreseeable future shift away from its historic place in the wire and cable industry. As the court found (J.S. 9a),

> It is easy to say that both Rome and Okonite possess the potential to expand internally so as to become an actual competitor with the other. It is a fact, however, that Rome has been in existence since 1936 and Okonite since 1878 and neither has, over the above periods of time, developed the full product line which the Government contends is potentially available to both.

The basic reason for this is that Rome lacks the technical capability to produce paper insulated cable and the other more sophisticated products in which Okonite specializes (Tr. II, 204-05, 213-16, 304-06, 309-10, 313, 332-34, 401-02), while Okonite has little or no economic incentive to apply its sophisticated technology to producing the relatively simple building wire, lower voltage power cables and overhead products which are the main product areas of Rome (Tr. II, 304-06, 309-10, 332-34, 401-02). For these reasons, unlike the situation in *Procter & Gamble*, there is no reason to believe that the existence of Rome and Okonite "at the edge" of each other's market exerts any influence whatsoever on their respective markets. *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967). Here again, the potential competition criteria outlined in

Penn-Olin sustain the district court's conclusion that Rome and Okonite are not likely to "become actual competitors in the market place" (J.S. 10a).

Finally, not only are the anticompetitive aspects of the proposed sale minor—so minor that the Government could not, in good faith, claim illegality—but there are likely to be offsetting benefits to competition. The Government stresses the importance of "maintaining independent fabricators in an industry characterized by a high degree of vertical integration". (J.S. 12, note 10), but the vigor of independent competition does not depend on a nose count of competitors but on the strength and quality of their competition. It is significant in this connection that the court found that the proposed sale would result "in a company with a full product line actually and potentially supplying . . . competition to the integrated copper and aluminum producers . . ." and that there would be "[e]conomies in operation and an increase in competition rather than a diminution thereof . . ." (J.S. 11a-12a). This conclusion is fully supported by the record which shows significant production economies in the manufacture of aluminum and copper rod (Tr. II, 306, 341), and marketing economies as the result of the broader line and larger sales volume that Rome-Okonite would have (Tr. II, 340, 426).

In sum, therefore, the relatively insignificant loss of competition suggested by the Government is likely to be more than offset by an increase in the vigor of the independent competition that Rome-Okonite would provide.

III

OTHER ERRORS CLAIMED BY THE GOVERNMENT ARE WHOLLY WITHOUT SUBSTANCE

The Government contends that the court erred in failing to inquire whether there might be some other purchaser more eligible than Okonite, i.e., that it was the court's view that "it is immaterial whether a sale to some other purchaser would pose lesser or no [competitive] problems" (J.S. 20). As the record shows, however, the court was quite prepared to "turn to somebody else besides this Okonite" if counsel could assure it that the Government would not object to a sale in which Alcoa retained a residual interest in Rome (Tr. II, 172-73). This counsel declined to do (*supra*, p. 16). Furthermore, the court dealt specifically with the Government's claim that Alcoa should be required to make a further effort to dispose of Rome to a more acceptable purchaser. Responding to this contention, the court held that "[i]f, in fact, Okonite be an eligible purchaser, further effort would seem not only to be unnecessary but detrimental to Rome's viability" (J.S. 10a-11a). As the court's opinion makes clear, this does not represent the "narrow approach" criticized by the Government (J.S. 20), but reflects consideration of the many aspects of the public interest so well served by this proposed sale, such as LTV-Okonite's ability to maintain and expand the Rome business, the lack of any retained interest on the part of Alcoa, the desirability of bringing this protracted litigation to a close, and the "speculative" nature of the "advantage which would result from further delay."

The Government also attacks two provisions in the court's divestiture decree. It contends that the so-

called upset price was too high and that the initial divestiture period of six months was too short to assure that Alcoa would find the most eligible available purchaser (J.S. 11, 20-21). These contentions are barred by the Government's failure to appeal from the court's divestiture decree. That decree was denominated a Final Judgment and qualified as a final judgment within the meaning of 15 U.S.C. § 29, notwithstanding that no definitive sale had yet been made (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 304-11 (1962)). Appeals to this Court from such final judgments "shall be taken . . . within 60 days . . ." (28 U.S.C. § 2101(b)), and failure to appeal within the time specified is a jurisdictional bar to appeal at some later time.

In any event, even if these contentions were properly before the Court, the questioned provisions were well within the equitable discretion of the district court. As noted earlier, the upset price provision was based on a similar provision in the Final Judgment accepted by the Government in the *Kaiser* case. The Government would now distinguish the *Kaiser* judgment on the ground that it was a consent decree, whereas the judgment here was entered in a litigated case (J.S. 22-23). This distinction is purely formalistic; this case and *Kaiser* are as identical as two cases can be, not only on the merits but with regard to local economic conditions that led the Government itself to conclude that an upset price would serve the public interest (*supra*, pp. 5-6). In these circumstances, the court, though not bound by the *Kaiser* judgment, was plainly entitled to consult it in formulating its decree.

Moreover, as noted above, the court did not fully adopt the *Kaiser* judgment, despite the complete iden-

tity of the two situations. It rejected emphatically the full retention provision, and, while it adopted the upset price because of its desire to avoid would-be salvagers and liquidators (J.S. 24a; Tr., February 4, 1966, p. 121), the court made clear that Alcoa was not to believe it could reject an offer merely because it did not meet the upset price. As the court said (J.S. 24a), "The [pricing] provision is intended to eliminate speculators but not to automatically exclude purchasers showing an ability and an intention to continue Rome as an active competitor in its field." This point was explained and emphasized in the court's transmittal letter to the parties:

> I realize that the [memorandum decision] may be considered to some extent as nullifying the upset price provision of the judgment. My intention is that Alcoa should report for investigation any offers from prospective purchasers which may be somewhat less than the upset price as ultimately determined. At the same time, I am trying to keep speculators, who are interested in short term profits, out of the picture.[26]

Equally untenable is the Government's claim that the court erred in establishing a period of six months in which Alcoa was to attempt to find a purchaser. The judgment expressly provides that this period would be extended to nine months (the same period

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[26] Letter from Judge Brennan, April 27, 1966. Nor is the Government factually correct in asserting that the function of the upset price is to enable Alcoa "to come out whole from its illegal acquisition of Rome . . .". That was neither its purpose nor effect. As the record shows if a sale is made at the full upset price, Alcoa will lose at least seven million dollars on its Rome venture, even after taking account of tax savings on the Rome losses (Tr. I, pp. 279-80).

used in the *Kaiser* decree) except upon a showing by defendants that there was no reasonable probability of making a sale (J.S. 31a). Moreover, expressing the belief that a sale could be accomplished within that time (Tr., February 4, 1966, pp. 59-60), the court pointed out that the purpose of the six month provision was to minimize the impact of a forced sale: "[W]here we direct this attempt to sell for whatever period of time it is, it will hurt, it will hurt the business, it will unsettle employees, it will hurt Rome . . . (*id.*, at p. 71). Clearly, the court's attempt to accommodate these interests was not an abuse of discretion, for the obligation of the court was to devise a remedy consistent with the facts "with as little injury as possible to the interests of private parties or the general public" (*Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130 (1962)).

Nor is there merit in the Government's final contention that by limiting the initial period of divestiture the court held out to Alcoa the hope that it might be permitted to retain the Rome properties, as Kaiser ultimately did in the *Kaiser-Bristol* proceeding. Refusing to adopt the automatic retention feature of the *Kaiser* judgment, the district court made it perfectly plain that he had no intention of allowing Alcoa to "escape from under my hand as easily and completely as they did [in the *Kaiser* case]" (Tr., February 4, 1966, p. 100). Any intimation that the court really intended otherwise must be rejected, as must any implication that Alcoa did not endeavor to sell Rome with utmost diligence and good faith.

CONCLUSION

For the foregoing reasons, the judgment and final order of the district court should be affirmed.

Respectfully submitted,

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September 1, 1967

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 271

UNITED STATES OF AMERICA, APPELLANT

v.

ALUMINUM COMPANY OF AMERICA AND ROME CABLE CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

JOINT SUGGESTION OF MOOTNESS AND MOTION TO VACATE

Appellant and appellees jointly move the Court to vacate as moot the judgment of the district court approving the plan of divestiture, entered on January 20, 1967, and to remand the case to the district court with a direction to conduct further proceedings.

This is a suit by the United States charging that the 1959 acquisition by Aluminum Company of America ("ALCOA") of the Rome Cable Company ("Rome") violated Section 7 of the Clayton Act. On

appeal from a dismissal of the action this Court reversed and remanded for divestiture proceedings. *United States* v. *Aluminum Company of America*, 377 U.S. 271.

A decree of divestiture was entered by the district court on April 27, 1966. Pursuant to that decree the district court approved a sale of Rome's facilities to the Okonite Company, an 83%-owned subsidiary of Ling-Temco-Vought, Inc.

Appellant opposed the sale because in its view it did not constitute appropriate and adequate relief under Section 7 of the Clayton Act. It took this appeal which was docketed on June 20, 1967. Appellees moved to affirm on September 1, 1967.

The contract for sale of Rome's assets to Okonite is memorialized in certain letters of agreement providing that either party may cancel the transaction on written notice to the other. On October 2, 1967, ALCOA advised Ling-Temco-Vought in writing that ALCOA was cancelling the agreement.

ALCOA has found another purchaser for Rome's facilities and the Department of Justice has determined that it has no objection to this purchaser. Under the terms of the decree, ALCOA must now apply to the district court for approval of the sale to the new purchaser.

Since the sale approved in the order appealed from has been cancelled, this appeal is now moot.[1] Accord-

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[1] The government's appeal also challenged certain provisions of the decree of divestiture entered April 27, 1966. The parties jointly urge that since the district court's judg-

ingly, the parties join in requesting this Court to vacate as moot the judgment of the district court approving the sale and to remand the case to the district court for further proceedings. Cf. *United States* v. *Munsingwear*, 340 U.S. 36, 39.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

HERBERT A. BERGSON,
Attorney for Appellee.

OCTOBER 1967.

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ment of approval has become moot, it is unnecessary for the Court to consider these issues or the timeliness of this aspect of the appeal.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

UNITED STATES *v.* ALUMINUM CO. OF AMERICA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

No. 271. Decided October 23, 1967.

PER CURIAM.

Upon consideration of the joint suggestion of mootness and motion to vacate, the judgment of the District Court of January 20, 1967, is vacated as moot and the case is remanded for further proceedings.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.